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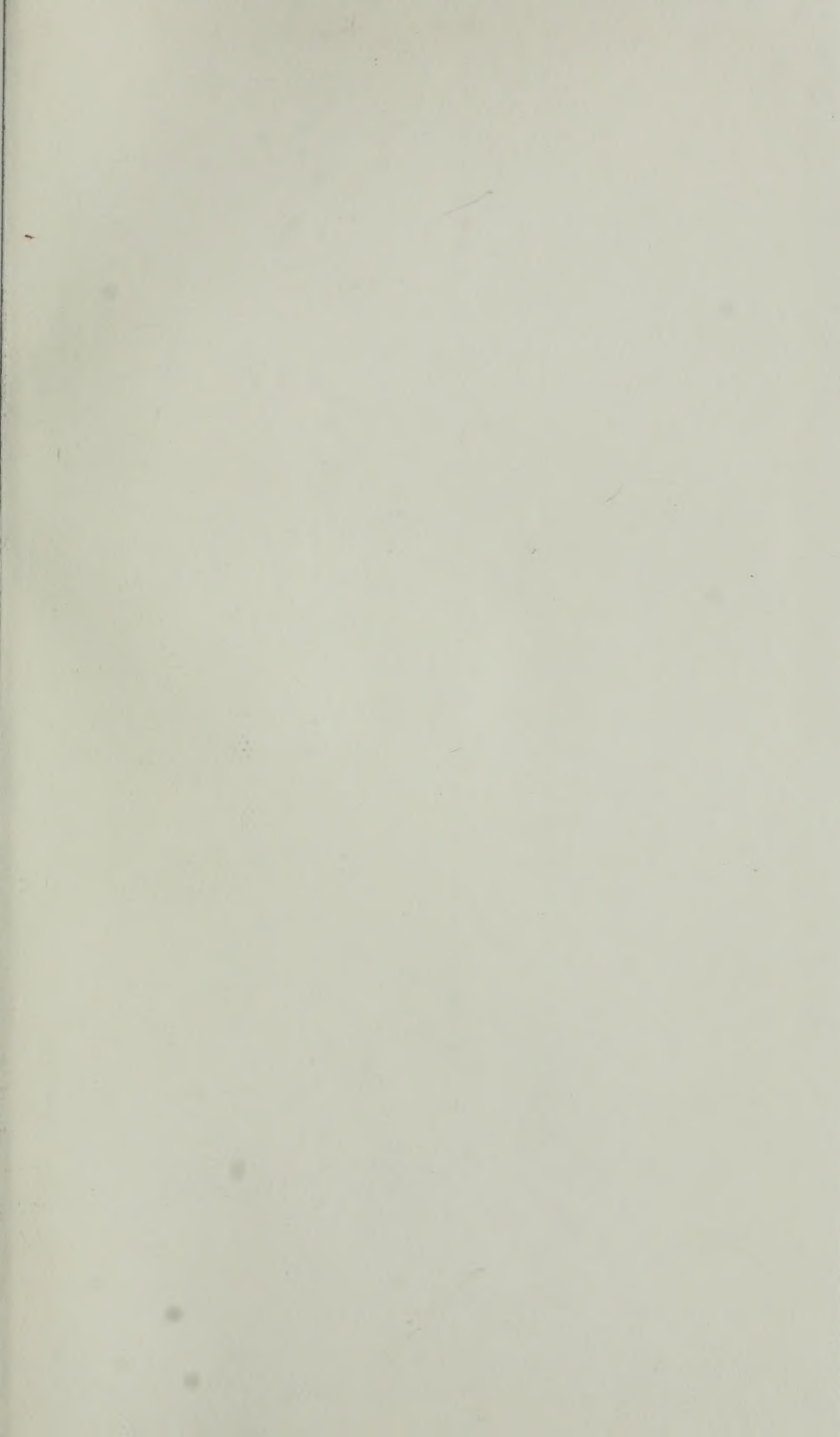
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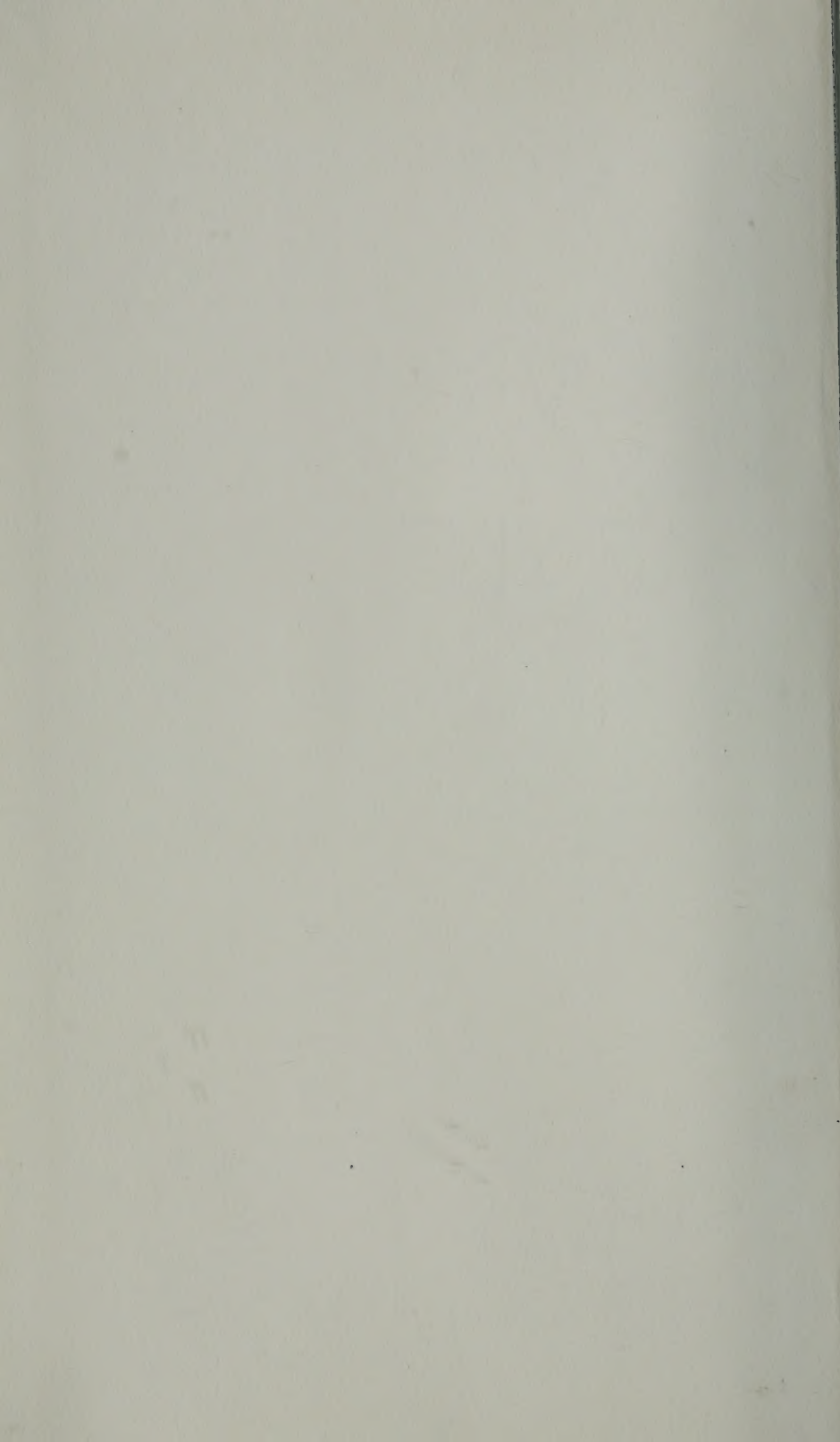
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No. 12532

2639

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

POTLATCH FORESTS, INC.,

Respondent.

Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board

FILED

JUL 24 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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GEORGE W. BEARDMORE,

Lewiston, Idaho,

For Potlatch Forests, Inc., Respondent.

United States of America, Before the National
Labor Relations Board, Nineteenth Region

Case No. 19-CA-166

In the Matter of
POTLATCH FORESTS, INC.
and
INTERNATIONAL WOODWORKERS OF
AMERICA, LOCAL 10-364, C.I.O.

COMPLAINT

It having been charged by International Woodworkers of America, Local 10-364, C.I.O., Lewiston, Idaho, that Potlatch Forests, Inc., Lewiston, Idaho, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 5, as amended, Section 203.15, hereby issues this Complaint and alleges as follows:

I.

Potlatch Forests, Inc., hereinafter called Respondent, is and has been since 1931, a corporation duly organized under and existing by virtue of the laws of the State of Maine, and has its principle office and place of business in Lewiston, Idaho.

II.

Respondent is engaged in felling timber and manufacturing lumber and lumber products from its logs, in which latter operation it operates sawmills and manufacturing plants at Lewiston, Potlatch and Coeur d'Alene, Idaho. The value of the products manufactured by Respondent annually at its aforesaid plants is in excess of \$1,000,000, which products are sold and shipped by Respondent from its said plants to customers in various States of the United States.

III.

Respondent is engaged in commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

IV.

International Woodworkers of America, Local 10-364, C.I.O., herein called Local 10-364, and its parent organization, International Woodworkers of America, C.I.O., herein called International, are unincorporated associations and are labor organizations within the meaning of Section 2, subsection (5) of the Act. On or about March 4, 1944, the Board certified International as the bargaining agent for the employees in Respondent's sawmills and manufacturing plants and its wood operations, and since said date International and Local 10-364 have functioned as bargaining agents of Respondent's employees working at its Clearwater plant.

V.

On or about August 7, 1947, International called

a strike of Respondent's employees for the purpose of securing a wage increase, and as a result Respondent closed down all of its operations. In early September, 1947, Respondent resumed the operation of its sawmills and manufacturing plants behind the picket lines of International, and by October 1, 1947, a substantial number of employees had returned to work despite the strike and a substantial number of new employees had also been hired by Respondent.

VI.

On or about October 12, 1947, International and Respondent executed an agreement in writing terminating the strike, whereby it was agreed that the wages of the employees were to remain at the same rate as before the strike and that all of the employees of Respondent still out on strike were to return to work thereafter without discrimination. Thereupon the strike ceased, the pickets were withdrawn, and a substantial number of the striking employees returned to their jobs with Respondent at their pre-strike wage.

VII.

At and after termination of the strike as aforesaid, Respondent inaugurated a so-called "Return-to-Work Policy" which provided that if and when there was a curtailment of Respondent's operations, the striking employees of Respondent who returned to work after the date of the strike settlement agreement aforesaid, were to be laid off or transferred to lower-rated jobs before the employees who

had returned to work or had been hired during the strike. Respondent currently maintains and gives effect to said policy at the date hereof, and has prepared and maintains revised seniority lists for purposes of laying off employees based on said policy, giving retention preference in event of curtailment of operations to those employees who had returned to work or had been hired during the strike of 1947 over those who had returned after the strike settlement.

VIII.

In late December, 1948, and early January, 1949, a temporary curtailment and reduction of personnel in some Departments at the Clearwater plant was necessitated by weather conditions, lack of incoming lumber and lack of box factory orders. This curtailment and reduction of personnel was handled by Respondent in accordance with Respondent's "Return-to-Work Policy" aforesaid in determining which employees should be retained and who should be laid off. The curtailment and reduction of personnel affected approximately forty-five employees, among them Gail Cloninger and Claude Walters, members of Local 10-364, who had gone out on strike on August 7, 1947, and had returned to their jobs with Respondent on October 13, 1947, after the strike settlement.

IX.

In giving effect to its "Return-to-Work Policy" described in paragraph VII, during the time and circumstances described in paragraph VIII, Re-

spondent suspended from employment and replaced with others the following employees for the periods specified:

1. Gail Cloninger, from December, 30, 1948, to January 6, 1949, when Respondent reinstated him.
2. Claude Walters, from January 21, 1949, to March 10, 1949, when Respondent reinstated him.

X.

By inaugurating, maintaining and giving effect to its "Return-to-Work Policy" aforesaid, and by laying off and replacing said Cloninger and Walters, as set forth and described in paragraphs VII to IX, inclusive, above, Respondent has discriminated and is now discriminating against its employees, including said Cloninger and Walters, in regard to hire and tenure of employment and the terms and conditions of employment, and by such discrimination has discouraged and is now discouraging membership in International and in Local 10-364, and thereby has engaged in and is now engaging in, unfair labor practices within the meaning of Section 8 (a), subsection (3) of the Act.

XI.

By all of the acts of Respondent set forth and described in paragraphs VII to IX, inclusive, above, and by each of said acts, Respondent has interfered with, restrained and coerced, and is interfering,

restraining and coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining and other mutual aid and protection, as guaranteed in Section 7 of the Act, and by all of said acts and by each of them, Respondent has engaged in, and is now engaging in unfair labor practices within the meaning of Section 8 (a), subsection (1) of the Act.

XII.

The acts and conduct of Respondent as set forth in paragraphs VII to IX, inclusive, above, occurring in connection with the operations of Respondent as described in paragraphs I, II and III above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states of the United States and have led to and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XIII.

The acts and conduct of Respondent as hereinabove set forth, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a), subsections (3) and (1), and Section 2, subsection (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board,

acting by and through the Regional Director for the Nineteenth Region of the Board, on this 24th day of June, 1949, issues this Complaint against Potlatch Forests, Inc., the respondent herein.

/s/ THOMAS P. GRAHAM, JR.,
Regional Director, Nineteenth Region, National
Labor Relations Board.

[Title of Board and Cause.]

ANSWER

Comes now Potlatch Forests, Inc., the Respondent herein, and in answer to the Complaint filed herein alleges:

I.

The Respondent, Potlatch Forests, Inc., admits paragraph One of the Complaint.

II.

The Respondent, Potlatch Forests, Inc., admits paragraph Two of the Complaint and further answering said paragraph alleges that in addition to the saw mills and manufacturing plants set forth in paragraph Two of the Complaint, the Respondent also has two logging operations, one at Headquarters, Idaho, and vicinity; and the other at Bovill, Idaho, and vicinity, and that all five operations are within the single bargaining unit.

III.

That the Respondent, Potlatch Forests, Inc., admits paragraph Three of the Complaint.

IV.

Answering paragraph Four of the Complaint, Respondent admits that the International Woodworkers of America, Local 10-364, C.I.O., herein called Local 10-364, and its parent organization, International Woodworkers of America, C.I.O., herein called International, are unincorporated organizations and are labor organizations within the meaning of Section 2, Sub-section 5 of the Act. Admits that on March 4, 1944, the Board certified the International as the bargaining agent for the employees in Respondent's saw mills and manufacturing plants and its woods operations. Respondent denies that the International and Local 10-364 has functioned as bargaining agents of Respondent's employees at its Clearwater Plant since said date.

As further answer Respondent alleges that said International has, at all times since March 4, 1944, had Locals 10-119, 10-358, 10-361 and 10-364 affiliated with it with members among the employees in the bargaining unit of the Respondent and International and said Locals have been and now are recognized as the bargaining agent. That International and Locals 10-361, 10-364, 10-358 and 10-119 have not complied with the National Labor Relations Act, as amended, and particularly Section 9

(f), (g) and (h), and that they are not now in compliance.

V.

In answer to paragraph Five of the Complaint, the Respondent, Potlatch Forests, Inc., denies that on or about August 7, 1947, International called a strike of Respondent's employees for the purpose of securing a wage increase, or that as a result of said strike it closed down all of its operations or resumed the operation of its saw mills and manufacturing plants behind the picket lines of International in early September, 1947. That the Respondent admits that by October 1, 1947, a substantial number of employees had returned to work despite the strike, but denies a substantial number of new employees had also been hired by Respondent.

That the Respondent, Potlatch Forests, Inc., as a further answer to paragraph Five of the Complaint alleges that on or about August 7, 1947, the International Union and Local Unions 10-119, 10-358, 10-361, and 10-364, called an economic strike of Respondent's employees for the purpose of securing a wage increase. That the employees quit work and left their jobs, and as a result thereof, all of the operations of the Respondent, Potlatch Forests, Inc., both in the saw mill and manufacturing plants and the logging operations ceased. That on August 29, 1947, employees commenced returning to work and on October 10, 1947, seventeen-hundred, sixty-seven (1767) employees were working in the operations of the Respondent, Potlatch Forests, Inc.

VI.

In answer to paragraph Six of the Complaint, the Respondent, Potlatch Forests, Inc., denies that on or about October 12, 1947, or any time, International and the Respondent executed an agreement in writing terminating the strike, or whereby it was agreed that the wages of the employees were to remain at the same rate as before the strike or that all of the employees of Respondent still out on strike were to return to work thereafter without discrimination or that by reason thereof the strike ceased or that the pickets were withdrawn or that a substantial number of the striking employees returned to their jobs with Respondent at their pre-strike wage, or at any wage.

As a further answer to paragraph Six of the Complaint, the Respondent, the Potlatch Forests, Inc., alleges that on or about October 7, 1947, officers of the International met in negotiation with the General Manager and Assistant General Manager of the Respondent, the Potlatch Forests, Inc., seeking a settlement and termination of said strike. The officers of International were advised at said meeting by the officers of the Respondent, Potlatch Forests, Inc., that the employees who had returned to work would not be displaced by employees returning to work after the strike settlement. That, thereafter and on October 9, 1947, two other officers of said International met with the officers of the Respondent, the Potlatch Forests, Inc., and again discussed a settlement of the strike. As a result of said meeting and on October 10, 1947,

the officers of International presented to the officers of the Respondent a memorandum as a basis for a proposed settlement, which memorandum among other things included the statement that all former employees of the Respondent, "will return to work without discrimination or loss of seniority on Monday, October 13." The officers of the Respondent advised the officers of the International that the memorandum was not satisfactory because it contained the words, "without loss of seniority," it having been agreed by the officers of the International and the officers of the Potlatch Forests, Inc., that employees who did return after the strike settlement would in no instance displace an employee who had returned to work prior to said settlement and that, therefore, the seniority of the employees returning after the strike settlement could not be protected. It being so agreed by the officers of International and the officers of the Respondent the words, "without loss of seniority," were stricken from the memorandum by the union. That after said deletion and on October 12, 1947, the officers of International and the officers of Respondent initialed a memorandum of proposed settlement, and agreed that employees who did return to work after the strike settlement would in no instance displace an employee who had returned to work prior to said settlement. That thereafter on October 13, 1947, the pickets were withdrawn from all of the operations of the respondent and all employees who desired to return to work returned

without discrimination and in keeping with the strike settlement.

VII.

The Respondent, Potlatch Forests, Inc., denies that at or after the termination of the strike, the Respondent inaugurated a so-called "return-to-work policy" which provided that if and when there was a curtailment of Respondent's operations, the striking employees of Respondent who returned to work after the date of the strike settlement agreement were to be laid off or transferred to lower rated jobs prior to the employees who had returned to work or had been hired prior to the date of said strike settlement agreement. That the Respondent denies that it currently maintains and gives effect to said policy at the date hereof, or that it has prepared and maintains revised seniority lists for purposes of laying off employees based on said policy or for giving retention preference in event of curtailment of operations to those employees who had returned to work or had been hired during the strike of 1947 over those who had returned after the strike settlement or for any other purpose.

In further answer to paragraph 7 of the Complaint, the Respondent alleges that after October 12, 1947, in accordance with the understanding and agreement between the officers of the International and the officers of the Respondent in reaching a settlement of said strike, the Respondent established a "return-to-work policy" which among other things provides that in the event of a curtailment the em-

ployees who returned after the strike settlement could in no instance displace an employee who had returned to work or hired prior to the settlement

VIII.

That the Respondent, the Potlatch Forests, Inc., admits paragraph Eight of the Complaint except that the Respondent denies that it has any knowledge or information sufficient to form a belief as to whether Gail Cloninger and Claude Walters are members of the I.W.A., C.I.O. Local 10-364, and, therefore, denies the same.

IX.

In answer to paragraph Nine of the Complaint, the Respondent denies that in giving effect to its return-to-work policy described in paragraph Seven of the Complaint or during the time and circumstances described in paragraph Eight that it suspended from employment and replaced with others the following employees for the period specified, to wit:

1. Gail Cloninger, from December 30, 1948, to January 6, 1949, when Respondent reinstated him.
2. Claude Walters, from January 21, 1949, to March 10, 1949, when Respondent reinstated him.

As a further answer to paragraph Nine of the Complaint, the Respondent alleges that Gail Cloninger on or about December 30, 1948, was a common

laborer receiving the minimum rate of pay and that he lost three shifts of employment, to wit: January 3, 4, and 5, 1949, due to adverse weather conditions. That Claude Walters was on or about January 18, 1949, a common laborer receiving the minimum rate of pay. That on January 22, 1949, he refused to work on a common labor job in the plant of the Respondent. On March 10, 1949, he accepted a job as common laborer in the plant of the Respondent, that the loss of time of the said Walters between January 22, 1949, and March 10, 1949, was due entirely to his refusal to work on common laborer jobs.

X.

In answer to paragraph Ten of the Complaint, the Respondent denies that by inaugurating, maintaining or giving effect to its return-to-work policy or by laying off or replacing said Cloninger or Walters as set forth in paragraphs Seven and Nine of the Complaint discriminated or is now discriminating against its employees or the said Cloninger or Walters in regard to hire or tenure of employment or the terms and conditions of employment or by such discrimination has discouraged or is now discouraging membership in International or Local 10-364 or any Local or thereby has engaged in or is now engaging in unfair labor practices within the meaning of Section 8 (a), Subsection (3) of the Act.

XI.

In answer to paragraph Eleven of the Complaint the Respondent denies that it has interfered with,

restrained or coerced or is interfering, restraining or coercing its employees in the exercise of their rights to self-organization or to form, or join or assist labor organizations or to bargain collectively through representatives of their own choosing or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act and Respondent denies that it has engaged in or is engaging in unfair labor practices within the meaning of Section 8 (a) Subsection 1 of the Act.

XII.

In answer to paragraph Twelve of the Complaint, the Respondent denies that its acts or conduct in connection with the operations of Respondent have a close intimate or substantial relationship to trade, traffic or commerce among the several states of the United States or has led to or tend to lead to labor disputes, burdening or obstructing commerce or the free flow of commerce except that the Respondent admits that it is engaged in traffic and commerce among the several states of the United States.

XIII.

In answer to paragraph Thirteen of the Complaint, the Respondent denies that its acts or conduct constitute unfair labor practices affecting commerce within the meaning of Section 8 Subsections (3) or (1) or Section 2, Subsections (6) or (7) of the Act.

As a first affirmative defense, the Respondent, Potlatch Forests, Inc., alleges:

I.

That the International has not fully complied and is not now in compliance with the National Labor Relations Act, as amended, and particularly Section 9 (f), (g) and (h). That said International and each of its agents and local unions, namely, Locals 10-119, 10-358, 10-361 and 10-364, having members among the employees in the bargaining unit of the Respondent, are not qualified to use the processes of the National Labor Relations Board by reason of their failure to comply with the provisions of the National Labor Relations Act, as amended.

II.

That the Complaint does not state facts sufficient to constitute a cause of Complaint for the reason that it fails to allege that International and its Locals have complied with provisions of the National Labor Relations Act, as amended.

As a second affirmative defense the Respondent alleges:

I.

The proceedings herein are barred by the Statute of Limitations Section 10 (b) of the National Labor Relations Act as amended as shown on the fact of the Complaint.

As a third affirmative defense the Respondent alleges:

I.

That there is no collective bargaining agreement covering seniority existing between the International, its Local and this Respondent, and for that reason the National Labor Relations Board has no jurisdiction to enter any order affecting seniority of Respondent's employees.

As a fourth affirmative defense the Respondent alleges:

I.

That the Respondent has many other and varied defenses not specifically herein set forth the nature of which will be shown at the trial of the cause herein.

Dated this Sixth day of July, 1949, at Lewiston, Idaho.

/s/ GEORGE W. BEARDMORE,
ELDER, ELDER & SMITH.

/s/ R. N. ELDER,

/s/ ROBERT H. ELDER,

/s/ SIDNEY E. SMITH,

Attorneys for Potlatch
Forests, Inc., Respondent.

State of Idaho

County of Nez Perce—ss.

H. L. Torsen, first being duly sworn on oath, deposes and says that he is the Treasurer of the Potlatch Forests, Inc., the above-named Respondent, and is authorized as such officer to make this verification for and on behalf of said Respondent, that he has read the foregoing answers, knows the contents thereof, and believes the statements made therein to be true.

/s/ H. L. TORSEN.

Subscribed and sworn to before me this sixth day of July, 1949.

[Seal] /s/ R. F. HANSEN,

Notary Public in and for the State of Idaho, Residing at Lewiston, Idaho.

Recived July 8, 1949.

[Title of Board and Cause.]

MOTION TO DISMISS

Comes now Potlatch Forests, Inc., Respondent herein, and files this Motion to Dismiss the Complaint for the reason and upon the grounds that the International Woodworkers of America, C.I.O., has not fully complied and is not now in full compliance with the National Labor Relations Act, as amended, and particularly Section 9 (f), (g) and (h). That said International Union and each of

its agents and local unions, namely, Locals 10-119, 10-358, 10-361 and 10-364, having members among the employees in the bargaining unit of the Respondent, are disqualified, due to said non-compliance, from using the processes of the National Labor Relations Board.

The complaint filed herein should be dismissed for the further reason that it appears from the Complaint the proceedings are barred by the Statute of Limitations, being Section 10 (b) of said National Labor Relations Act.

The Complaint filed herein should be dismissed for the further reason that it does not set forth facts sufficient to state an unfair labor practice within the meaning of Section 8 (a), Subsections (3) and (1) of said Act.

This motion is made and based upon the records and files herein and the records and files of the National Labor Relations Board and the Secretary of Labor of the United States of America.

Dated this sixth day of July, 1949, at Lewiston, Idaho.

/s/ GEORGE W. BEARDMORE.

/s/ R. N. ELDER,

/s/ ROBERT H. ELDER,

/s/ SIDNEY E. SMITH,

Attorneys for Potlatch
Forests, Inc., Respondent.

Received July 8, 1949.

[Title of Board and Cause.]

MR. HERBERT J. MERRICK,

For the General Counsel.

ELDER, ELDER & SMITH, by

MR. R. N. ELDER,

Of Coeur d'Alene, Idaho, and

MR. GEORGE W. BEARDMORE,

Of Lewiston, Idaho,

For the Respondent.

GEORGE AND BABCOCK, by

MR. HARRY GEORGE, JR.,

Of Portland, Ore.,

For the Charging Local.

INTERMEDIATE REPORT

Statement of the Case

Upon a charge filed February 16, 1949, and amended March 18, 1949, by International Woodworkers of America, Local 10-364, C. I. O., herein called the charging local, the General Counsel of the National Labor Relations Board, by the Regional Director for the Nineteenth Region (Seattle, Washington), issued his complaint, dated June 24, 1949, against Potlatch Forests, Inc., Lewiston, Idaho,

herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) of the National Labor Relations Act, as amended June 23, 1947 (Public Law 101, 80th Congress, Chapter 120, 1st Session), herein called the Act.

With respect to the unfair labor practices, the complaint alleged in substance that after the termination by settlement agreement, on October 12, 1947, of an economic strike of the Respondent's employees, the Respondent inaugurated and has since maintained a so-called "Return-to-Work Policy," under which, for purposes of lay-off or transfer to lower-rated jobs in the event of curtailment of operations, employees who returned to work or were hired during the strike are given retention preference rights over employees who returned to work after the date of the strike settlement; that in giving effect to its "Return-to-Work Policy" during a temporary curtailment of operations in some departments of its Clearwater plant, the Respondent laid off and replaced with others Gail Cloninger, for the period from December 30, 1948, to January 6, 1949, and Claude Walters, for the period from January 21, 1949, to March 10, 1949; and that by inaugurating, maintaining, and giving effect to its "Return-to-Work Policy" and by laying off and replacing Cloninger and Walters as aforesaid, the Respondent discriminated against its employees, including Cloninger and Walters, in

violation of Section 8 (a) (3) of the Act, and thereby also engaged in conduct violative of Section 8 (a) (1) of the Act.

In its answer duly filed July 8, 1949, the Respondent in substance denied that it had engaged in the alleged unfair labor practices. In addition, the Respondent alleged affirmatively (1) that there was a failure of proper compliance with the provisions of Section 9 (f), (g), and (h) of the Act; (2) that the unfair labor practices alleged in the complaint are barred by the 6-month limitation proviso of Section 10 (b) of the Act; (3) that the Board is without jurisdiction to enter any order affecting the seniority of the Respondent's employees because of the absence of any collective bargaining agreement covering seniority; and (4) that "the Respondent has many other varied defenses not specifically herein set forth the nature of which will be shown at the trial of the cause herein."

Pursuant to notice, a hearing was held on July 11 and 12, 1949, at Lewiston, Idaho, before the undersigned, Arthur Leff, the Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel, the Respondent, and the Union were represented at and participated in the hearing. All parties were afforded opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

At the opening of the hearing, a number of motions were made by the Respondent, to dismiss the complaint in its entirety, were denied. The mo-

tions were made upon the following alleged grounds: (1) that certain constituent locals of the International Woodworkers of America, having among their members employees of the Respondent in the bargaining unit for which the said International is the certified representative, are disqualified from using the processes of the Board because of non-compliance with the provisions of Section 9 (f), (g), and (h) of the Act;¹ (2) that the 6-month limita-

¹The Respondent has a number of operations in scattered localities. All are grouped in a single company-wide bargaining unit, with the International as the certified bargaining representative for the production and maintenance employees. The International has affiliated with it four locals having members among employees in the bargaining unit—Local 358 at Pierce, Idaho, Local 119 at Coeur d'Alene, Idaho, and Local 364 (the charging local) at Lewiston, Idaho. These locals, jointly with the International, have been parties to the contracts covering employees in the bargaining unit. Cloninger and Walters, the employees alleged in the complaint to have been discriminatorily laid off, were members of the charging local which exercises jurisdiction over the Clearwater operation at Lewiston where they were employed. The General Counsel stated at the hearing—and the Respondent did not dispute—that at the time of the issuance of the complaint both the charging local and its parent International were in full compliance with the requirements of Section 9 (f), (g), and (h). He conceded, however, that two of the remaining three locals, with members among the employees in the bargaining unit at other operations, were not in compliance.

The Respondent contended that the complaint was fatally defective in that compliance was not pleaded. This contention is without merit. The Board has

tion upon the filing of charges operated as a bar to this proceeding; and (3) that the complaint failed to state facts sufficient to establish the commission of any unfair labor practice. Motions were also made by the General Counsel at the opening

held that the question of compliance is a matter for administrative determination; it is not a litigable issue, and need not be pleaded or proved. See, e.g., *Matter of Baldwin Locomotive Works*, 76 N. L. R. B. 922; *Matter of Lion Oil Co.*, 76 N. L. R. B. 565; and *Matter of Pauls Valley Milling Co.*, 82 N. L. R. B., No. 149.

The Respondent contended further that, since this proceeding involves basically the legality of the Respondent's seniority policy as applied throughout the bargaining unit, it is a prerequisite to invocation of the Board's processes that all constituent locals with membership among the employees in the unit be in compliance. Were this a proceeding seeking to establish or otherwise to aid the bargaining position of a labor organization, the Respondent's position might have been well taken. Cf. *Matter of Marshall & Bruce Co.*, 75 N. L. R. B. 90; *Matter of Prudential Insurance Company*, 81 N. L. R. B., No. 16. But it is not. All this proceeding looks toward is a cease and desist order enjoining certain alleged practices that are violative of individual employee rights protected by the Act. The Board's processes for that purpose might properly have been invoked by a charge filed by any interested individual. The right of the charging local to file such a charge on behalf of its affected members was no less, since both it and its International were in compliance. That members of other locals which are not now in compliance may also incidentally derive benefits from an unfair labor practice finding in this case, is immaterial. See, *Matter of United Engineering Co.*, 84 N. L. R. B., No. 10.

of the hearing to strike the several affirmative defenses alleged in the Respondent's answer. The motions were denied, with one exception.² During the hearing, decision was reserved on motions of the General Counsel and the Union to strike certain testimony claimed to be inadmissible under the parol evidence rule. The disposition of these motions is indicated in the Findings of Fact made below. At the close of the case, the Respondent moved to dismiss the complaint upon grounds substantially the same as were asserted by it at the opening of the hearing. To the extent that the motion sought dismissal under Section 9 (f), (g), and (h) and under Section 10 (b), it was denied. To the extent that it sought dismissal upon the ground that the evidence was insufficient to establish an unfair labor practice, ruling was reserved on the motion; and it is now disposed of in the manner indicated in the body of this report. A motion made by the General Counsel at the close of the case, to conform the pleadings to the proof with respect to minor matters, was granted.³ Oppor-

²The General Counsel's motion, to dismiss for indefiniteness and uncertainty the affirmative defense alleging that the Respondent had "other varied defenses not herein specifically set forth," was granted, with leave to the Respondent to apply, if it desired, to have its answer amended so as to allege specifically such other affirmative defenses as it might have.

³After the close of the hearing, an order was entered correcting certain inaccuracies in the transcript of proceedings.

tunity was afforded all parties to argue the issues orally upon the record and to file briefs and proposed findings of fact and conclusions of law. Only the General Counsel availed himself of the opportunity to argue orally. Briefs were received from the charging party and from the Respondent.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Respondent

Potlatch Forests, Inc., a corporation organized under the laws of the State of Maine, has its principal office and place of business in Lewiston, Idaho. The Respondent is engaged in felling timber and manufacturing lumber and lumber products from its logs. It operates sawmills and manufacturing plants at Lewiston, Potlatch, and Coeur d'Alene, Idaho, in addition to two logging operations, one at Headquarters, Idaho, and vicinity, and the other at Bonvill, Idaho, and vicinity. The value of the products manufactured by the Respondent annually at its aforesaid plants is in excess of \$1,000,000. These products are shipped by the Respondent from its said plants to customers in various States of the United States. The Respondent admits that it is engaged in commerce within the meaning of the Act.

II. The Organization Involved

International Woodworkers of America, Local 10-364, C. I. O., and its parent organization, Inter-

national Woodworkers of America, affiliated with the Congress of Industrial Organizations, are labor organizations admitting to membership employees of the Respondent.

III. The Unfair Labor Practices

A. Background

1. Introduction

Certified by the Board on March 4, 1944, the International Woodworkers of America, herein called the IWA, has since been the recognized exclusive bargaining agent of the Respondent's production and maintenance employees in a bargaining unit embracing the Respondent's five operations. On April 1, 1945, and again on April 1, 1946, collective bargaining agreements, styled Master Working Agreement, were executed by the Respondent, on the one hand, and, on the other, jointly by the IWA and each of its four constituent locals which numbers among its members employees of the Respondent's various operations. The IWA and its four locals, jointly, are referred to in the Master Agreement as the Union, and they will so be referred to in this report.

The Master Working Agreement expressly recognized that the principle of seniority was to govern retention of jobs during any curtailment of operations. Detailed provision was made for the application of that principle. Among other things, it was provided:

All seniority shall be considered first by job classification, second by department, and last by plant. It shall be used as a basis for preference in shift as well as promotion and in event of curtailment or during slack work periods. An employee demoted shall go down through the same route by which he progressed.

Before the strike of August, 1947, referred to below, there were no substantial differences between the Respondent and the Union as to the operation of the seniority system upon a reduction in force. For purposes of this proceeding it is unnecessary to consider in detail just how seniority operated in all its ramifications, particularly with respect to employees in skilled job classifications. Gail Cloninger and Claude Walters, the specific objects of discrimination alleged in the complaint, occupied jobs in the common labor classification. Since theirs was the lowest classification, and all common labor jobs in a given department, regardless of their particular character, are regarded as lying in a pool, the principle of seniority by job classification did not apply as to them. An employee in the common labor classification was, however, entitled to retention rights in his particular department on the basis of his seniority there. And, if his tenure was insufficient to allow him to retain his job in his department, he could exercise his plant seniority to claim retention rights over any similarly classified junior employee in the plan for whose job he was qualified. In no event could such an employee, upon a reduction in

force, be forced out of his department ahead of another employee similarly classified who had less department seniority and less plant seniority and whose job he was capable of filling.

The Master Agreement of April 1, 1946, ran for a term of 1 year. Before its expiration date, negotiations were begun for a new contract. By May 28, 1947, the Respondent and the Union had reached agreement on all disputed points, save the Union's demand for the elimination of an area wage differential. The agreement of the parties was embodied in two written memoranda, dated May 7 and May 28, 1947. These, in substance, set out the parties' interpretation and clarification of certain clauses of the 1946 Master Agreement that had been in dispute; made certain revisions with regard to wages; and provided for an extension of the 1946 Master Agreement, subject to the modifications noted, until April 1, 1948. Left unchanged—except for a minor interpretation not here material—were the seniority provisions of the former agreements. The issue of the wage differential, alone, was left open for future negotiation.

2. The Strike and the Strike Settlement Agreement

Negotiations on the wage differential issue having reached an impasse, the Union on August 7, 1947, called an economic strike of the Respondent's employees. The strike at first resulted in a complete shutdown of all the Respondent's operations. But starting about the end of August, employees began to return to work across the picket lines, and the

Respondent also hired some new employees as replacements for the strikers. By October 10, 1947, some 1,750 employees were working in the bargaining unit, which normally has a complement of about 2,600.

With the strike apparently hopelessly lost, the Union sued for peace. Through an intermediary, an exploratory meeting to discuss settlement was arranged with the Respondent. The meeting, held on October 7, 1947, was attended by General Manager C. L. Billings and Assistant General Manager Otto H. Lauschel, for the Respondent, and by George Brown and Albert Hartung, IWA officials, for the Union. The Respondent's representatives made it clear at the outset that there would be no concession on the matter of the wage differential, and that point apparently was not pressed by the IWA representatives who made no effort to conceal their anxiety to terminate the strike. The subject most broadly discussed, although not the only one, related to the procedures to be followed in getting the strikers back to work; and how replacements and employees who had crossed the picket lines were to be protected in the jobs they were holding at the termination of the strike. No conclusion was reached at that meeting, but the IWA officials agreed to refer the views expressed to those IWA officials who would be authorized to carry on from that point. Thereafter, on October 9, and again on October 10, additional meetings were held. At these, the Respondent was represented by the same negotiators, and the Union by Walter Botkin and

Jodie Eggers, of the IWA Regional Negotiating Committee. Botkin and Eggers made clear at the outset of the meetings that they were merely acting for the Regional Committee, and that any agreement reached by them would be merely tentative until approved by the union membership. In general the same matters were discussed at these meetings as at the October 7 meeting. During the discussions the points upon which the parties appeared to be in agreement were reduced to writing, and drafting revisions were made. In the end, the negotiators settled upon a written form of memorandum embodying five points upon which the negotiators had agreed as a basis for strike settlement to be submitted to the union membership for approval. The memorandum, which was not signed or initialed at that time, read as follows:

As a basis for settlement of the present dispute between the IWA and the Potlatch Forests, Inc., the following is proposed.

1. The Union agrees to withdraw its demands for a $7\frac{1}{2}$ wage increase to eliminate the differential. Wages to remain at rates as of August 6, 1947. Picket lines to be withdrawn as of October 13, 1947.

2. All former employees at Potlatch Forests, Inc., will return to work without discrimination, on Monday, October 13th. Former employees shall return to work by October 22, to protect their job rights. In the event the job

formerly held by the returning employee is not open, the employee will be given other work and receive pay on the basis of the rate paid on his former job.

3. Men previously on gypo basis will be assigned to gypo work if still available. If gypo work is not available, pay will be at the rate shown in wage schedule for the job.

4. The Company has informed the Union that the night shift of the box factory in the Clearwater Mill cannot be started at this time, due to business conditions, and for that reason it may not be able to employ all of the former box factory workers immediately. These box factory workers will be given preference over new employees in filling vacancies in other departments.

5. The present contract will remain in effect without change except that the following is substituted for the 4th paragraph in Article VII.

As a condition of continued employment, every employee who confirms to the Company his membership in the Union as of November 20, 1947, or becomes a member of the Union after November 20, 1947, shall be required to maintain his membership in good standing.

On October 11, the strike settlement proposal in the form set out above was submitted to membership meetings of the several locals involved, was voted on by the membership, and was approved. On Oc-

tober 12, Botkin again met with the Respondent's negotiators. At that time the strike settlement memorandum, in the precise form set out above, was dated and initialed by Botkin for the Union, and by Billings and Lauschel for the Respondent.

On October 13, 1947, in compliance with the strike settlement agreement, the Union terminated the strike and withdrew its pickets.

3. The inauguration by the Respondent of its "Return-to-Work Policy," with "strike seniority."

Shortly after the strike settlement agreement was signed, a group of higher management officials, including Lauschel, determined upon and drafted a so-called "Return-to-Work Policy." According to the testimony of Clearwater Manager David S. Troy, a member of this group, the strike settlement agreement, as it was interpreted by Management, was used as the basis for formulating the Policy. The purpose of the Policy, according to the Respondents' witnesses, was to provide a guide for the uniform interpretation and application of the settlement terms by management officials at the Respondent's various plants. The text of the Policy, to the extent applicable to the issues of this case, is set forth below:

Potlatch Forests, Inc.—Return to Work Policy

Employees who returned to work October 13th to 22nd, inclusive, 1947, will, in case of

curtailment, be laid off ahead of employees who returned to work or were hired on or before October 12, 1947 (settlement date). The order of layoff in each group will be based on each person's previous seniority rights.

Employees who return to work on or before October 12, 1947, re-established their previous seniority for all purposes. Employees who returned to work October 13 to October 22, inclusive, 1947, re-established their previous seniority for purposes of curtailment as among this group (returning October 13 to 22, incl.), and for training and promotion among all groups.

Employees who returned to work on or before October 22, 1947, but whose jobs had been filled while they were on strike will be given an opportunity to return to their old jobs at the first opening occurring. If this opportunity is passed up, then the employee's rate will revert to the rate of the job he holds and he will have no further right to return to his old job.

* * *

Employees who returned to work on or before October 22, 1947, will retain all previous seniority rights for purposes of training and promotion.

Former employees who returned to work after October 22, 1947, will be classed as new employees.

The aspect of the "Return-to-Work Policy" most pertinent here is the division of the Respondent's employees, for purposes of determining seniority upon a reduction in force, into two classes—one, composed of those who had crossed the Union's picket lines during the strike; the other, made up of those who remained out on strike during its entire course. Employees in the first class were granted the benefit of a form of super seniority—later styled by the Respondent as "strike seniority." Employees in the second class suffered, concomitantly, an impairment of their pre-strike relative job retention rights in the bargaining unit considered as a whole.

It was stipulated by the Respondent that since the termination of the strike it has continued to maintain and give effect to the seniority principles set out in its "Return-to-Work Policy."

It has already been noted that the "Return-to-Work Policy" was drafted by officials of the Respondent without consulting the Union. After it was drafted, it was neither submitted to any union official, nor was it printed or otherwise generally publicized among the employees in the Respondent's plants. Employees were made aware of "strike seniority" only when they as individuals inquired concerning their own relative seniority status. It was not until June, 1949, that the union officials were shown for the first time a copy of the "Return-to-Work Policy."⁴

⁴In June, 1949, the Policy in its written form was brought officially to the Union's attention by a con-

But that is not to say that in the interim the Union was unaware that the Respondent was maintaining a policy of according to employees who had worked during the strike preferential treatment at variance with the seniority provisions of the Master Agreement. Notice to that effect, at least in a general way, was brought home to the Union long before the layoffs of Cloninger and Walters. Thus, shortly after the termination of the strike, grievances charging impairment of seniority rights were filed on behalf of a number of the Respondent's railroad employees who had remained out through the entire course of the strike.⁵ During the process-

ciliator who was seeking to resolve the parties' differences in their negotiations for a new contract. The negotiations had bogged down, it seems largely as a result of the Respondent's insistence and the Union's refusal to include a "super-seniority" provision giving preference to employees who had worked during the 1947 strike.

⁵The nature of these grievances was not fully developed on the record, and it is difficult to tell with any certainty precisely what was involved. It would appear, however, from the grievance complaint forms which are in evidence, that none of the grievances concerned a question of retention rights upon reduction of force. The grievances appear to have involved, rather, the issue of whether certain strikers were entitled upon their return to specific jobs or rates of pay; it being claimed in some cases that the grieving employees were denied their former job or jobs to which their seniority entitled them, although such jobs were not actually filled by others at the conclusion of the strike. It seems, although the record is also somewhat deficient in this regard, that the Respondent defended

ing of these proceedings it was indicated to union officials, by statements of company representatives as well as through other sources, that the Respondent was interpreting the strike settlement agreement as granting, at least for certain purposes, preferential seniority treatment to those employees who had returned before the strike settlement date. The Respondent's interpretation, it seems, was based in part upon what it considered to be an oral or implied understanding reached by the negotiators of the strike settlement agreement. The nature of the alleged oral understanding will be considered at some length in a subsequent section of this report. It need only be observed here that during the railroad grievances, the Union took issue with the Respondent's position, denying then, as it does now, that any agreement or understanding, oral or otherwise, had ever been reached by the negotiators to vary the seniority provisions of the contract.

these particular grievances mainly upon the ground that the actions complained of were warranted by the replacement provisions of the settlement agreement. The railroad grievances were carried to the highest level of the grievance procedure where the Union finally, but under protest, acquiesced in the Respondent's position. It is the Union's position that it acquiesced only because its only other available remedy was to strike, and this it was not in a position to do at that time. Although, according to the Union, it regarded the Respondent's action against the railroad employees as discriminatory, it decided against filing an unfair labor practice charge at the time, because there was then pending a petition filed by a rival union raising a question of representation which the Union was anxious to have speedily resolved.

The question, whether seniority was to be interpreted in a manner different from the provisions of the last Master Agreement, arose again following the conclusion of negotiations for a new contract in the spring of 1948. No issue apparently was raised during the negotiations with regard to the seniority provisions of the former contract. After the negotiations had resulted in agreement upon all points in issue, a "recommended" agreement, dated April 13, 1948, was signed by the negotiating parties, detailing the agreed upon modifications, amendments, and interpretations to the former contract. In accordance with the usual practice, the agreement of April 13, 1948, was then submitted to the union membership, and was ratified. It was understood that after ratification a new Master Agreement was to be drawn by the Respondent to include the provisions of the last one, as modified by the various written memoranda of agreement that had been signed since. When the new Master Agreement was typed by the Respondent, it included a clause reading, "The strike settlement of October 12, 1947, shall control the application of the seniority article." Taking the position that no mention had been made in the negotiations concerning this clause, the Union refused to sign the Master Agreement in that form. But although no Master Agreement was signed, the record is clear, and it is found, contrary to the position of the Respondent's counsel, that the last Master Agreement, as modified by the several agreements hereinabove referred

to, was in fact extended in its operative effect until April 1, 1949.⁶

B. The Lay-offs of Cloninger and Walters

1. Gail Cloninger

Hired on July 24, 1940, Gail Cloninger thereafter worked without break for the Respondent, principally in its box factory, until his induction in the military service on December 31, 1941. On August 19, 1943, after his military discharge, he was rehired with veterans reemployment rights. On September 3, 1946, he was transferred to the carpenter crew of the Clearwater maintenance department, where, classified as a common laborer, he worked continuously until the strike of August 7, 1947. Cloninger remained out on strike until after its settlement date, returning on October 13, 1947. Upon his return he was reassigned to work as a

⁶This finding is convincingly established by the following: (1) The record clearly shows that the parties dealt with each other on that basis; (2) Charles J. Commerford, Clearwater's personnel director until July 1, 1949, so testified; (3) The Master Agreement provides for 60 days' notice prior to the April 1 expiration date of a change of terms. On January 28, 1949, the Respondent notified the Union of its desire "to negotiate a written agreement based on the Master Agreement effective April 1, 1946, as modified by the subsequent agreements of May 7 and 28, 1947, October 12, 1947, and April 13, 1948, incorporating in one agreement the various interpretations, clarifications, and amendments which have never been combined in a single signed agreement."

truck driver's helper on the carpenter's crew, the very job on which he had been working immediately before the strike.

On December 30, 1948, the Respondent, due to adverse weather conditions, found it necessary to curtail operations in its Clearwater maintenance department, and a number of employees, including Cloninger, were laid off from their jobs in that department. During Cloninger's absence from the maintenance department, Dale Cox filled his place as truck driver's helper on the carpenter's crew. Cox was first employed by the Respondent on November 13, 1946, worked in the box factory until June 5, 1947, then was transferred to the carpenter's crew in the maintenance department, and worked there until the strike on August 7, 1947. Returning to work on October 1, 1947, while the strike was in progress, Cox was given a job in the sawmill, and remained there until December 15, 1947, when he was again transferred to the carpenter's crew.

The Respondent's witnesses conceded that under the Respondent's prestrike interpretation of the applicable seniority provisions, Cloninger's seniority, both in the maintenance department and in the plant, would have been considered greater than that of Cox; that Cloninger would have had prior retention rights in the department upon a curtailment of operations; and that he could not have been replaced by Cox in a situation such as this. The reason Cox was retained in the department in preference to Cloninger, according to the testimony of

Clearwater Personnel Director William Green, was because Cox had returned to work through the picket line, and, on the basis of the Respondent's post-strike seniority interpretations, was consequently entitled to "strike seniority."

After his lay-off from the maintenance department, Cloninger filed a grievance protesting the action taken against him as being at variance with his seniority rights. The Respondent defended on the ground that Cloninger had no "strike seniority." The grievance was carried by the Union to the highest step of the grievance procedure, short of conciliation. The Union agreed at that level that Cloninger be put back to work under the Respondent's interpretation of the seniority provisions, but it expressly noted on the grievance settlement that it was not agreeing by its action in Cloninger's case to any over-all settlement recognizing the validity of the Respondent's seniority interpretation. IWA Organizer Frank E. Gordon testified that the Union did not carry the grievance to the final procedural level of conciliation, because it felt nothing would be gained by that step, because it did not care to strike on the issue, and because it considered that the issue had best be resolved through unfair labor practices charges to be filed with the Board. It was Gordon's further uncontradicted testimony that the Respondent was so informed at the time of the disposition of the Cloninger grievance.

Upon receipt of his lay-off notice, Cloninger, in accordance with the Respondent's usual practice,

was referred to the employment office for possible reassignment. On that day he was offered a job, also in the common labor classification, in another department, to begin on January 2, 1949. Cloninger declined to accept this job immediately, because he desired first to process his grievance. On January 4, 1949, he did accept a job in the cut-up department, and went to work on January 6. On February 15, 1949, he was retransferred to the carpenter's crew of the maintenance department. No back pay is claimed for Cloninger.

2. Claude A. Walters

Claude A. Walters, whose jobs with the Respondent were in the common labor classification, went to work in the unstacker department on May 17, 1944, and, except for two temporary assignments each of 2 days' duration, worked continuously in that department until the time of the strike. He remained out on strike during its entire length, returning on October 13, 1947. Upon his return, he was given his former job in the unstacker department, and remained there until January 18, 1949, when, as a result of a curtailment of operations necessitated by economic considerations, he was given a lay-off notice, along with others. At the time of his lay-off, Walters was informed by his foreman that he would have retained his job in the department had he come back to work only 1 day before the termination of the strike.

Paul Slater was one of the common laborers who

was retained during the curtailment in this department. Slater, whose service in the plant dated from January 15, 1946, and in the unstacker department from May 9, 1947, had gone on strike with the other employees on August 7, 1947, but had returned to work in the unstacker department on September 9, 1947, before the strike had run its course. The Respondent conceded that Walters could have performed the clean-up work to which Slater was assigned during the period of curtailment. And it is not disputed that under the Respondent's prestrike interpretation of the applicable seniority principles, Walters, on the basis of his service in the department and in the plant, would have had preferred retention rights over Slater in the department. The reason for retaining Slater while laying off Walters, it was conceded, was because Slater, unlike Walters, had "strike seniority."

On January 20, 1949, before his lay-off in the replant department, Walters was offered a watchman's job carrying the common labor rate of pay. Walters refused the watchman's job, stating then, as he also did at the hearing, that his feet and ankles could not stand the walking involved. It appears, however, that Walters' job in the unstacker department also required him to be constantly on his feet. On January 27, 1949, Walters was offered a box picking job in the replant department on the night shift, paying a common labor rate plus a night shift differential. But he declined that job also, because, he said, it involved night work and he would have transportation difficulties in getting to the plant. It appears, however, that in the unstacker depart-

ment Walters had worked during alternate months at nights. And the record further shows conclusively that there was a bus running between a point close to Walters' home and the plant, with schedules timed to coincide with the night shift hours. On March 2, 1949, Walters called at the employment office, and was offered a job in the unstacker department on the 3 a.m. to 11 a.m. shift. He refused this job, too, for the reason (in this instance apparently justified) that it would entail transportation problems. At that time, he asked for a job tending lawns, but none was available. The following week, Walters was offered, and accepted, a common laborer's job in the dock department. He remained on that job until March 21, 1949, when he was reassigned to the unstacker department. In the case of Walters back pay is claimed for the period from January 22 to March 10, 1949. That claim is disposed of in the section below, entitled "The remedy."

No formal grievance was filed by Walters or on his behalf. Walters, however, discussed the situation with the IWA organizer, Frank Gordon, who in turn took up the matter informally with Personnel Director Commerford. After Commerford advised Gordon of the job offers Walters had turned down, Gordon did not press the matter further. According to Gordon's testimony, he felt the better procedure would be to add Walters' name to the unfair labor practice charge which the Union was then preparing to file.

3. Factual analysis of the Respondent's contention that the Union agreed to "strike seniority" as part of the strike settlement.

The Respondent asserts that in applying "strike seniority" in the lay-offs of Cloninger and Walters, it was doing no more than conforming to the terms of the 1947 strike settlement agreement. With that assertion, the General Counsel and the Union take sharp issue.

It is clear, of course, that the five-point strike settlement memorandum of October 12, 1947, cannot be relied upon to support the Respondent's position. Not only does the memorandum omit all reference to "strike seniority" (in the sense covered by the opening paragraph of the "Return-to-Work Policy"), but it contains a number of express provisions that appear patently inconsistent with that principle. Among the express terms of the memorandum that are in competition with "strike seniority," are (a) the provision that former employees are to return "without discrimination"; (b) the provision that those who return by October 22 will "protect their job rights"; and (c) the provision that, save for the union security clause, "the present contract (including it must be assumed its seniority provisions) will remain in effect without change."⁷

⁷In only one situation does the memorandum make express provision for the impairment of job rights of a striker returning after the strike settlement date and before the October 22 cut-off date—and that is where his former job is no longer open.

But in pressing its contention, the Respondent does not rely, except possibly in part, upon the terms of the written memorandum. It takes the position that the written memorandum expressed only partially the agreement of the parties; that there was in addition a supplementary verbal understanding providing in effect for "strike seniority." The Union denies that any such supplementary understanding was reached. To support its claim the Respondent rests upon the testimony of Otto Lauschel, one of its negotiators, at the strike settlement.

Analysis of Lauschel's testimony on this factual issue reveals the following: Although there had been prior discussion concerning reinstatement of returning strikers to jobs which had been filled by others during the strike, the question of seniority, as such, was first brought to the forefront at the meeting of October 10, 1947. It specifically arose in this manner. During the settlement negotiations various drafts of a proposed settlement agreement had been prepared. On October 10, the union negotiators submitted a draft in the precise form later initialed by the parties, except for one clause. There was added to the provision that former employees were to "return to work without discrimination," the clause "and without loss of seniority." The insertion of that clause met with objection from the Respondent's negotiators. They were then principally concerned with protecting men already at work in particular jobs against being displaced from such jobs by returning strikers. Apparently

centering their argument about that point, the Respondent's negotiators protested that the insertion of the clause referring to seniority would not at the conclusion of the strike protect employees already working against displacement by returning strikers in the particular jobs they were then holding. The question of protecting the jobs of replacements upon a further curtailment of operations, to the extent that it was raised at all, came up only as an incident to the main point with which the Respondent was concerned.⁸ The union negotiators, declining to accede to any relinquishment of its striking members' seniority rights, strongly opposed the Respondent's position. After some lengthy discussion of this issue, at which no agreement was reached, the union negotiators retired from the meeting room to consider the matter privately. They returned with the words "and without loss of seniority" stricken from draft.⁹ Asked by the Respondent's represent-

⁸Jodie Eggers, a union negotiator, testified that he could not "recall any mention of curtailment as far as it would affect employees as such." On the basis of all the evidence, however, I am persuaded that the question of curtailment was raised by the Respondent, but only from the point of view indicated above, and not from the point of view of granting employees who had returned during the strike a form of super-seniority generally applicable in cases of curtailment.

⁹Eggers testified that the union negotiators decided in caucus to delete the phrase "without loss they were of the opinion (1) that this phrase conflicted in a sense with the provision in the settlement of seniority" to eliminate confusion, and because

atives why they had deleted the phrase, the union negotiators replied that it was going to be difficult enough to sell the union membership on a strike settlement involving no gain to the strikers, without further complicating settlement by any reference to seniority. The Respondent's negotiators made no response, except to say, "Maybe that is all right too," and to add that it probably was a matter of no importance anyway, since it could not affect anyone until a serious curtailment took place, and no such curtailment was in prospect at that time.

There was no further discussion of the subject, and the matter was allowed to rest at that point. The Respondent's representatives were fully aware at the time that the Union's negotiators were unauthorized to do more than tentatively settle upon terms of an agreement which was to be reduced to written form for submission to and ratification by the union membership before it could become binding upon their principal. Yet they admittedly made no attempt to have inserted in the written memorandum any express reference to "strike seniority."

Lauschel testified that he "assumed" the Union's negotiators had agreed to "strike seniority"; and

ment draft, to which they were prepared to accede, that returning strikers were not to be reinstated to jobs formerly held by them if such jobs had since been filled by others and were no longer open; and (2) that, except in a situation involving the actual replacement, of strikers' seniority rights would in any event be fully protected by the settlement provision continuing in effect the then existing collective bargaining agreement.

that his "assumption" was based entirely upon their conduct in striking "and without loss of seniority" from the draft. He admitted, however, that at no time during the course of the negotiations or thereafter, had the union negotiators expressed in words their agreement with the Respondent's position on "strike seniority." Asked by the Respondent's counsel why, if there was such an agreement, no affirmative mention was made of it in the memorandum, Lauschel replied:

They (the Union's negotiators) didn't want it in there. * * * Because they said they couldn't sell that type of a thing to their membership, they would rather not have anything said about seniority to complicate the settlement of the strike, and get the men back to work.

It was Lauschel's further testimony that until the memorandum was dated and initialed on October 12, 1947, he had viewed it simply as a proposal for a settlement, but that, once initialed, he regarded it no longer as a proposal, but as a strike settlement agreement embodying the full understanding of the parties. That, too, is the view of the Union and of the General Counsel.

Upon the foregoing facts, I am unable to conclude that the Union and the Respondent agreed that the principle of "strike seniority" was to control future reductions in force, as alleged by the Respondent.

The finding sought by the Respondent would, to begin with, patently vary and contradict the unambiguous terms of the signed strike settlement

agreement of October 12, 1947. I am persuaded that the parol evidence rule—which has as its basis the assumed intention of parties who have evidenced their understanding by a written document to place themselves beyond the uncertainties of extrinsic evidence—is applicable and controlling in this situation. The entire record, and Lauschel's testimony as well, makes it clear that when the parties dated and initialed the memorandum of October 12, they intended that document as an integration of all that had been said and done in the course of the negotiations. All prior negotiations between the parties thus became superseded by, and merged in, the written instrument itself, thereby precluding consideration of prior utterances and acts of the parties on the subject of the agreement for the purpose of varying, adding to, or subtracting from its terms.¹⁰ It is of no avail to the Respondent that it may have executed the agreement upon a mistaken assumption, however sincerely held, that certain of its terms would be construed in a manner different from their plain and ordinary meaning.¹¹ On the facts of this case, I am unable to conclude that the Respondent's mistaken assumption was mutually shared by the Union, or that it was induced by fraud or other improper conduct of the Union. But even if it were assumed, as some of Lauschel's testimony may suggest, that the negotiators for the respective parties

¹⁰⁹ Wigmore, Evidence § 2425, 2471 (3rd ed. 1940); Richardson, Evidence § 420 (4th ed. 1944).

¹¹Wigmore § 2415, 2460, 2461.

tacitly joined to conceal from the union membership a secret collateral understanding, the Respondent's position would not be aided. In that event, culpability for the concealment would have to rest at least equally with the Respondent's negotiators, who, as noted, were then on notice of the limited authority of the Union's negotiators and of the necessity of submitting the proposed settlement agreement in written form for union ratification. And the Respondent, whose negotiators had thus at least shared in inducing the union membership to rely on the writing, without revealing in the writing itself that certain unequivocal terms used therein were to be ignored or else construed in some special sense, would not now be in a position to escape the normal consequences of what was represented in writing as the agreement, on the basis of an alleged extrinsic prior oral understanding at variance with the specific written terms relied upon and approved by the union membership.¹²

Moreover, even if the Respondent were correct in contending that the parol evidence rule is inapplicable to this situation, the conclusion reached would be the same. Lauschel's own testimony accepted at face value it is found, is insufficient as a matter of substantial evidence to support a finding that the Respondent and the Union orally agreed that "strike seniority" was to govern employee retention rights in a situation such as prevailed when Cloninger and Walters were laid off from their

¹²See, Wigmore, § 2463.

departments. Apart from the questionable authority of the Union's negotiators to enter into an oral agreement binding on the Union, Lauschel's testimony fails to establish a meeting of minds between the negotiators for the respective parties on this subject. Clearly, there is no direct evidence of assent; for, as Lauschel himself conceded, the Union's negotiators at no time expressed their agreement with the Respondent on "strike seniority." Nor may an inference of assent reasonably be drawn from the conduct of the Union's negotiators in striking from the written document the "and without loss of seniority clause"; for such an inference would be inconsistent not only with the remaining terms of the document, but with the announced reason for the deletion. Proof of a bilateral agreement requires a positive showing of mutual assent to its terms, evidenced by the words or conduct of both parties to the transaction. Where, as here, the words are lacking and the conduct is too equivocal to show assent by one of the parties, it is not enough that the other may have unilaterally "assumed" the existence of an understanding.

It is found, contrary to the Respondent's contention, that the memorandum of October 12, 1947, reflects the strike settlement agreement, and that the Union did not agree to "strike seniority" upon a curtailment of operations, as alleged by the Respondent.¹³

¹³A procedural matter remains to be disposed of. The testimony of Lauschel relating to the negotiations leading to the strike settlement agreement was

4. Concluding findings

The central issue to be determined is whether the Respondent engaged in unfair labor practices within the meaning of Sections 8 (a) (3) and 8 (a) (1) of the Act, by selecting Gail Cloninger and Claude Walters for lay-off in their respective departments while retaining others junior to them in point of service—the selection admittedly having been made pursuant to the Respondent's previously formulated "Return-to-Work Policy," which provided, *inter alia*, that, in the event of a lay-off resulting from a curtailment of operations, employees who returned to work or were hired during the course of the 1947 strike were to possess preferential retention rights over employees who remained out until the termination of the strike.

received subject to a later motion to strike if the parol evidence rule were found applicable. Decision was reserved upon the motion to strike. Although the rule has now been found to apply, the motion to strike is, nevertheless, denied. The parol evidence rule is essentially a rule of substantive law; it is not a rule of evidence, though, like any principle of substantive law it may operate as a guide to what evidence should be admitted. (Wigmore § 2400, 2425). As a matter of substantive law, Lauschel's testimony, whether or not it is permitted to remain in the record, may not be considered for the purpose overriding the written signed agreement. For that reason, and because much of Lauschel's testimony is material to the contested issue of whether the agreement was intended as a completed document, it has been decided to deny the motion.

Although the Respondent contends otherwise in its brief, it is clear from the undisputed record facts, and it is found, that neither Cloninger nor Walters were actually replaced during the 1947 strike. As has been shown, immediately upon the strike's conclusion, both were restored to work on the precise jobs they had held when the strike began. In making the aforementioned finding, the Respondent's "partial reinstatement" argument has not been overlooked. The Respondent advances the novel thesis that, since common labor in any given department in the Respondent's plant is a "pooled" and not a specific job classification, the filling during the strike of any common labor jobs in a given department operated as a partial displacement of all in that department's common labor pool who remained out on strike. Consequently, the argument continues, strikers such as Cloninger and Walters upon their return to work at the end of the strike were entitled only to "partial reinstatement"—that is, a qualified form of reinstatement which restored to them all their former job rights, except the right which might otherwise flow from their seniority to displace upon a future reduction in force those employees who during the course of the strike had already "partially" displaced them.

At least as applied to this case, and particularly to the situation of Cloninger and Walters, the Respondent's "partial reinstatement" argument is found to be based upon premises, not only incon-

sistent with the terms of the strike settlement agreement,¹⁴ and otherwise false in fact,¹⁵ but unsup-

¹⁴The strike settlement agreement makes no reference, either expressly or by implication, to "partial reinstatement" of employees, who, like Cloninger and Walters, returned at the end of the strike to their former jobs which were still open at the time. On the contrary, the agreement explicitly provides for the return of such strikers "without discrimination" and for the protection of their "job rights."

¹⁵The Respondent's argument appears to be based upon fictional reasoning. Viewing the facts practically and realistically, it is difficult to comprehend how it can be said of employees like Cloninger and Walters that they were replaced even on a partial basis, when at the conclusion of the strike they were immediately returned to their former positions. Though common labor in each department be considered a pool, the pool presumably was no larger upon their return than when they left on strike. Even more difficult to follow is the claim that they were replaced by employees who had worked at their sides before the strike, but who, although they had also gone on strike, had chosen to return to work before the strike's termination. Whether or not an employee has been replaced is to be tested not by whether some one else has performed his work during his absence on strike, but by whether a vacancy exists for him to his former job at the time he elects to abandon the strike and to return to work.

In the case of Cloninger, the Respondent's own hypothesis would not support a finding that Cloninger was replaced in his department by Cox, the employee with less service credit who was retained when Cloninger was laid off. Cox, when he returned to work during the strike was placed in another department, and did not reenter Cloninger's department until some time after Cloninger's re-

portable in law. *N. L. R. B. v. Mackay Radio Telegraph Company*, 304 U. S. 333, does not, as the Respondent suggests, support its position in that regard; rather it refutes it. The holding in that case—that an employer “is not bound to discharge those hired to fill the places of (economic) strikers upon the election of the latter to resume their employment in order to create places for them”—is based upon the proposition that no discrimination may be found in an employer’s refusal to restore to work economic strikers for whom vacancies no longer are open because the employer, with the non-discriminatory object of continuing his business, has replaced the strikers during their voluntary absence on strike. But where, as in this case, places are in fact available for the returning strikers, and they are actually restored to their former jobs at the termination of the strike, the Mackay Radio doctrine cannot be construed to justify as non-discriminatory their “partial reinstatement,” as that term is used by the Respondent. For, as the Supreme Court expressly recognized in the Mackay Radio case, strikers during the course of a strike retain their status as employees under Section 2 (3) of the Act, and, if places are available upon their election to return, any discrimination in putting them back to work is prohibited by Section 8. The controlling rule was recently restated by

turn. How it can be said in these circumstances that Cox displaced Cloninger in the common labor pool of Cloninger’s department, baffles understanding.

the Board in Matter of General Electric Company, 80 N. L. R. B., No. 80, as follows: “* * * except to the extent that a striker may be replaced during an economic strike, his employment relationship cannot otherwise be severed or impaired because of his strike activity.”

There can be no doubt, and it is now well settled, that a seniority policy which classifies employees according to whether they had worked during a strike, or had not, to the detriment of the relative seniority standings of these who had not, discriminatorily and illegally impairs the employment relationship of those who had exercised their right under the Act to engage in concerted activities. See Matter of General Electric Company, *supra*; Matter of Precision Castings Company, 48 N. L. R. B. 870; and Matter of Paper, Calmenson and Company, 26 N. L. R. B. 553. And this is so regardless of whether or not there is in existence at the time a collective bargaining agreement covering the subject of seniority. In this case it has been found that a contract, including substantially the seniority provisions of the last Master Working Agreement, was in force when Cloninger and Walters were laid off. But were the facts otherwise, as the Respondent contends, the conclusion reached would still be the same. Seniority rights, to be sure, are not self existing rights arising from the mere fact of employment; they are rights that normally derive their scope and significance from union contracts. *Aeronautical Lodge v. Campbell*, 377 U. S. 521. But that does not mean, as the Respondent

further urges, that, in the absence of an agreement covering seniority, the Board is without jurisdiction to enter an order affecting seniority of employees. The Act's protective provisions, safeguarding employees against discrimination for having chosen to exercise their statutorily guaranteed rights, apply independently of contract. They are no less applicable where the discriminatory penalty for having exercised such rights takes the form of a departure from the order in which an employee could otherwise expect to be laid off upon an economic curtailment, than where it takes the form of an outright discharge of an employee whose tenure of employment is not protected by a contract.

It follows that the Respondent's application of its discriminatory seniority policy must be held violative of the Act, unless the Respondent has some other defense. The Respondent in its brief suggests several.

The Respondent's principal ground of defense has already been adverted to—its claim that the Union agreed to "strike seniority" as part of the 1947 strike settlement. The validity of such an agreement, had it been established, would have been open to grave doubt. For it is seriously to be questioned whether a Union may legally bargain away in a strike settlement a safeguard so fundamental as that accorded individual employees under the Act to be protected from discriminatory action for having exercised their guaranteed right to engage in

legitimate strike activities.¹⁶ That, however, is a question that need not be decided here. It has been found as a fact that the Union did not agree to "strike seniority." The finding of fact thus removes the question of law.

The Respondent asserts as a further defense that this proceeding is barred by the limitations provision of Section 10 (b) of the Act, as well as upon equitable doctrines. It is contended that the validity of the "strike seniority" policy is no longer open to attack, because it was established some 16 months before the filing of the charge, and because it was in the meantime allegedly acquiesced in by the Union. Section 10 (b) is clearly inapplicable. The issue in this case is not whether the Respondent committed an unfair labor practice by inaugurating the policy, but whether it violated the law by continuing to maintain it; more specifically by applying and giving effect to it in the lay-offs of Cloninger and Walters.¹⁷ These lay-offs occurred well within the statutory period limited by Section 10 (b). The Respondent's earlier conduct has been considered

¹⁶See *Matter of Briggs. Indiana Corporation*, 63 N. L. R. B. 1270, at 1272.

¹⁷The complaint, it is true, alleges that the Respondent violated the Act by "inaugurating," as well as by "maintaining and giving effect." to the policy. At the opening of the hearing, however, the General Counsel announced that an unfair labor practice finding was being sought only with regard to the Respondent's conduct in maintaining and giving effect to the policy within the 6-month period preceding the filing of the charge.

here merely for the purpose of bringing into clearer focus the conduct in issue. Even without such consideration, however, the allegations of discrimination would have been found amply supported by such undisputed record facts as bear directly upon the lay-offs of Cloninger and Walters.

The further contention, that the proceeding is barred upon equitable grounds because of the Union's alleged long acquiescence in the "strike seniority" policy, rests upon no firmer ground. In point of fact, the Respondent's position is found unsupported by the record. Acquiescence in a discriminatory policy cannot be implied merely from a failure to file an unfair labor practice charge, particularly where, as here, the Union protested the policy from the beginning, at least to the extent that the policy was made known to it. But even had acquiescence by the Union been established, it could not, in point of law, have estopped the Board from proceeding with the case. The Board does not exist for the adjudication of private rights, but acts in a public capacity to give effect to the declared public policy of the Act to promote the full flow of commerce by, among other things, proscribing certain practices, defined in Section 8, which have been found by Congress to affect commerce and to be inimical to the general welfare. *Phelps Dodge v. N. L. R. B.*, 313 U. S. 177; *Matter of H. M. Newman*, 85 N. L. R. B., No. 132. Nor is it a valid defense, that the Union accepted the Respondent's decision on the Cloninger grievance and failed altogether to process a grievance for

Walters. This is so not only because of the public policy considerations just indicated, but also because the Board has exclusive power to remedy unfair labor practices, a power which under Section 10 (a) of the Act, may "not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." See *N. L. R. B. v. Newark Morning Ledger Co.*, 120 F. 2d 262, 268 (C. A. 3), cert. den. 314 U. S. 693.

It is concluded and found that, by laying off Cloninger from the maintenance department on December 30, 1948, and Walters from the unstacker department on January 18, 1949, while retaining in such departments other employees, who, but for the fact that they had gone to work during the 1947 strike while Cloninger and Walters had not, would have been laid off ahead of Cloninger and Walters, and by thus applying and giving effect to a seniority policy under which employees who refrained from working during the entire course of the 1947 strike were to be laid off ahead of employees who returned to work or were hired during the course of that strike, the Respondent discriminated with regard to the hire and tenure of employment and the terms and conditions of employment of Cloninger and Walters, thereby discouraging membership in the charging local and in its parent International, and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent, described in Section I, above, have a close, intimate and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom, and that it take certain affirmative action designed to effectuate the policies of the Act.

Since both Cloninger and Walters, who were found to have been discriminatorily laid off, were restored to the jobs held by them prior to their discriminatory lay-off, no order of reinstatement is necessary. As has already been noted, no claim for loss of earnings is made in connection with the discrimination against Cloninger. Although such a claim is made with regard to Waters, I find it unsupported. On the basis of the facts set out above, I am persuaded that the several jobs offered Walters by the Respondent, beginning on January 20, 1949, were jobs which he could have filled, that such jobs were offered him in good faith by the Respondent, that he did not accept such jobs because

he did not desire to work during that period, and that any losses in earnings incurred by him between the date of his discriminatory lay-off from the unstacker department on January 18, 1949, until he was reinstated to his former job, were wilfully incurred. Consequently, no back pay order is recommended in Walters' case. See *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177.

Although Cloninger and Walters are the only employees specifically found to have been discriminated against through application of the "strike seniority" policy, it appears that the Respondent continues to maintain that policy, and, unless the Respondent is ordered to cease and desist therefrom, the danger is to be anticipated that other employees similarly situated may upon a future curtailment of the Respondent's operations also suffer a discriminatory impairment of their employment relationship. Consequently, it will be recommended that the Respondent cease and desist from continuing to maintain or to give effect to said policy.

Conclusions of Law

1. International Woodworkers of America, Local 10-364, C.I.O., and its parent organization, International Woodworkers of America, C.I.O., are labor organizations within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment and terms and conditions of employment of Gail Cloninger and Claude Walters,

thereby discouraging membership in labor organizations, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By said acts, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, it is recommended that the Respondent, Potlatch Forests, Inc., Lewiston, Idaho, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining or giving effect to any seniority or lay-off policy which discriminates against any of its employees with regard to the order in which they are to be selected for lay-off, or with regard to any other aspect of their employment relationship, on the basis of whether they had or had not engaged in strike or concerted activities, or on the basis of the period during which they had engaged in such strike or concerted activities.

(b) Discouraging membership in International

Woodworkers of America, Local 10-364, C.I.O., and its parent organization, International Woodworkers of America, C.I.O., or any other labor organization of its employees, by in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of employment.

2. Take the following affirmative action, which it is found will effectuate the policies of the Act:

(a) Post immediately at its Clearwater plant at Lewiston, Idaho, copies of the notice attached hereto, marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(b) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the receipt of this Intermediate Report what steps the Respondent has taken to comply therewith;

It is further recommended that, unless the Respondent shall, within ten (10) days from the receipt of this Intermediate Report, notify the Regional Director for the Nineteenth Region in writing that it will comply with the foregoing recommendations, the National Labor Relations Board

issue an order requiring the Respondent to take the action aforesaid.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board, any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Washington, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 30th day of September, 1949.

/s/ ARTHUR LEFF,
Trial Examiner.

Appendix A

Notice to All Employees Pursuant to

The Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not maintain or give effect to any seniority or lay-off policy which discriminates against any of our employees with regard to the order in which they are to be selected for lay-off, or with regard to any other aspect of their employment relationship, on the basis of whether they had or had not engaged in strike activities, or on the basis of the period during which they had engaged in any such activities.

We Will Not discourage membership in International Woodworkers of America, Local 10-364, C.I.O., and International Woodworkers of America, C.I.O., or in any other labor organization of our employees, by in any other manner discriminating against any of our employees in regard to their hire or tenure of employment, or any term or condition of their employment.

All our employees are free to become or remain members of any labor organization. We will not discriminate in regard to tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

POTLATCH FORESTS, INC.

(Employer.)

Dated

By,

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

RESPONDENT'S EXCEPTIONS TO INTER-
MEDIATE REPORT OF TRIAL EX-
AMINER

Respondent Potlatch Forests, Inc., makes exceptions to the Intermediate Report of the Trial Examiner herein, dated September 30, 1949, as follows:

A.

Exceptions to Rulings on Motions of Respondent

1. Exception is taken to the rulings of the Trial Examiner denying the motion to dismiss the complaint made at the opening of the hearing, which motion was renewed at the close of the hearing (page 2, folios 21-30; page 3, folios 1-3; page 3, folios 9-13) on the grounds that they are contrary to law.

B.

Exceptions to Findings of Fact and Conclusions of
Law Contained in the Intermediate Report

Section III A 2

1. Exception is taken to the findings and conclusions on page 5, folios 56-61 upon the grounds that the testimony and evidence does not sustain them in that they imply all of the agreements and understandings were reduced to writing.

Section III A 3

2. Exception is taken to the findings and con-

clusions set forth on page 7, folios 50-57, on the ground that said findings and conclusions are inaccurate and not supported by the testimony and evidence in that they state the "return-to-work" was drafted without consulting the Unions; that the employees were aware of their seniority status only when they, as individuals, inquired concerning their seniority status, and that the "return-to-work policy" was not generally publicized among the employees.

3. Exception is taken to the findings and conclusions on page 8, folio 33; page 9, folios 1-14, on the ground that the same are not supported by the testimony and evidence and are erroneous and inaccurate constructions of General Counsel's Exhibit 4. The findings and conclusions are erroneous and inaccurate in that the agreement of April 13, 1948, was an agreement on certain points but did not extend the basic Master Agreement of April 1, 1946, which, by its own terms, expired May 1, 1948.

Section III B 2

4. Exception is taken to the findings and conclusions set forth on page 11, folios 47-60 on the ground that said findings and conclusions are not supported by the testimony and evidence, are erroneous and inaccurate constructions of General Counsel's Exhibit 5 contrary to law. The findings and conclusions are inaccurate and erroneous in that they imply the entire strike settlement was included in said exhibit and that the "return-to-work"

policy is inconsistent with the terms of said exhibit.

5. Exception is taken to the findings and conclusions on page 12, folios 21-43; page 13, folios 1-37, on the grounds that they are not supported by the testimony and evidence and are not an accurate analysis of the testimony of Respondent's witness O. H. Leuschel. The findings and conclusions are erroneous and inaccurate in that they state and imply the negotiators were principally concerned with protecting men already at work against being displaced by returning employees. That was the immediate concern of the negotiators but not the principal concern. The displacement in the event of curtailment was as much concern to the negotiators as the displacement on the return to work. The only difference was in the time element involved. The findings and conclusions, together with footnote #9, further are inaccurate and erroneous in that they imply the Union negotiators conveyed to the Respondent's negotiators the reason set forth in footnote for deleting the clause "without loss of seniority" from the Union draft of the proposed settlement agreement. Respondent's negotiators, prior to the deletion, when they insisted upon the elimination of that clause, explained that the seniority of the individuals returning after the settlement would be affected insofar as they would not displace a person upon return to work or in the event of a curtailment. The seniority of the employees returning after the settlement would be intact for all other purposes as training, promotions and vacations. The

basic principles of the "return-to-work" policy and its operation were fully discussed, understood and agreed upon between the negotiators and they understood the necessity of eliminating the clause.

The conclusions and findings further are erroneous and inaccurate and not supported by the testimony and evidence, particularly on page 13, folios 5-9, in that there is no testimony or evidence that the entire agreement and understanding was to be reduced to written form for submission to and ratification by the Union. The entire informal agreement has never been reduced to a formal written agreement signed by the respective parties.

Said findings and conclusions further are inaccurate and erroneous and not supported by the testimony and evidence in finding Respondent's witness Leuschel admitted or took the view that the proposed memorandum (General Counsel's Exhibit 5) embodied the sole and complete understanding and agreement of the parties. The conclusion the Union and the Respondent had not agreed to the basic principles as set forth in the "return-to-work policy" (General Counsel's exhibit 10) is an erroneous and inaccurate construction of the testimony and evidence and such conclusion is not supported by the testimony and evidence.

6. Exception is taken to the findings and conclusions of page 13, folio 39-57; page 14, folios 1-46, for the reason that the same are not supported by the testimony and evidence and are contrary to law. The conclusions and findings are erroneous and in-

accurate in that they find and imply that General Counsel's Exhibit 5 contains the entire understanding, agreement and settlement between the parties, and the written terms of said Exhibit are unambiguous. The actions of the Union negotiators striking out the clause "without loss of seniority" when they had been told, knew and agreed with the position of the Respondent's negotiators as to the operation of the "return-to-work policy" and the application of seniority upon the return to work of the employee or in the event of a subsequent curtailment, constituted an acceptance on the part of the Union negotiators of the Respondent's counter offer of settlement of the strike.

The findings and conclusions further are inaccurate in that they imply the negotiators for the respective parties connived to conceal from the Union membership a secret collateral understanding. There is no evidence of any such connivance. The manner and method of submitting and explaining the various understandings and agreements between the negotiators to the Union membership, either in oral or written form, are and were solely the duty and responsibility of the Union's negotiators. The evidence shows that there never has been a written ratification or approval by the membership or on its behalf, of the complete strike settlement agreement or that all the terms ever have been reduced to a formal written instrument signed by the respective parties.

The evidence does not sustain the conclusions and findings that the Union's negotiators announced

their reasons for deleting the clause, "and without loss of seniority." No such reasons were announced by the Union negotiators. The only fair and accurate construction of the negotiations and acts of the Union negotiators is that they accepted the Respondent's counter offer of settlement which included the basic principles of the "return-to-work policy" by eliminating the words "without loss of seniority." There is no evidence that the Union negotiators failed to explain to the membership the reasons for the striking of that clause from the Union's original proposed offer of settlement. There is no evidence that the Union negotiators conveyed to the Respondent's negotiators any details of the membership discussion.

The findings and conclusions on page 14, folio 43-46, that the memorandum of October 12, 1947, (General Counsel's Exhibit 5) reflects the entire of the strike settlement agreement and that the union did not agree to the principles of the "return-to-work policy" in the event of a curtailment are not supported by the testimony and evidence and are contrary to law.

Section III B 4

7. Exception is taken to the findings and conclusions on page 15, folios 1-13, with reason that the same are not supported by the testimony and evidence. The findings and conclusions are erroneous and inaccurate in that they infer the principles of the "return-to-work policy" were not understood, agreed to and accepted by the Union.

8. Exception is taken to the findings and conclusions on page 15, folios 15-19, upon the grounds that they are not sustained by the evidence and are contrary to law. The evidence was undisputed that both Cloninger and Walters were common laborers, that common labor is a pooled classification and employees in the common labor pool have no rights to any specific job; and that there were common laborers employed in their respective departments when they returned from the strike. This being so, Cloninger and Walters had been replaced, both in keeping with General Counsel's Exhibit 5 and the "return-to-work policy."

9. Exception is taken to the findings and conclusions on page 17, folios 8-10, as the same are contrary to law.

10. Exception is taken to the findings and conclusions on page 17, folios 13-23, upon the ground they are contrary to the testimony and evidence and are contrary to law. The principal issue is whether or not it is an unfair labor practice within the meaning of 8 (a)(1) of the National Labor Relations Act, as amended, to follow a policy and seniority practice set up in accordance with the provisions of a strike settlement agreement negotiated by the bargaining agent, which policy protects the seniority of strikers for all purposes except in the event of curtailment. In that event an employee who returned to work prior to the termination of the strike cannot be displaced by one who did not return until after the termination of the strike.

The failure of the Trial Examiner to rule on the validity of the agreement and understanding covering the principles of the "return-to-work policy" is the principal issue of this case and exception is taken to the failure of the Trial Examiner to find and conclude that such an agreement is valid.

11. Exception is taken to the findings and conclusions on page 17, folios 25-50; page 18, folios 1-18, upon the grounds that the same are contrary to law. Said findings and conclusions hold that the proceedings are not barred by the limitation provisions of Section 10 (b) of the National Labor Relations Act, as amended, and the equitable doctrine of laches.

12. Exception is taken to the findings and conclusions on page 18, folios 14-34, upon the grounds they are not supported by the evidence and are contrary to law. Said findings hold that the "return-to-work policy" as applied to Cloninger and Walters discouraged membership in the Union, interfered, restrained, and coerced employees in the exercise of their rights guaranteed under Section 7 in violation of Section 8 (a) (1) of the National Labor Relations Act, as amended.

Section IV

13. Exception is taken to the findings and conclusions on page 18, folios 39-44, upon the ground they are not supported by the testimony and evidence and they are contrary to law.

14. Exception is taken to Conclusions of Law Nos. 2, 3, and 4 on page 18, folios 25-38, upon the ground that they are not sustained by the testimony and evidence and they are contrary to law.

15. Exception is taken to Recommendations Nos. 1 (a), (b), and 2 (a) and (b), on pages 19 and 20, being folios 46-60 and 1-24, respectively, for the reason that the same are not sustained by the testimony and evidence and are contrary to law.

It is respectfully submitted the Respondent has committed no unfair labor practice in violation of the National Labor Relations Act, as amended, and the complaint should be dismissed.

Respectfully submitted,

ELDER, ELDER AND SMITH.

By /s/ R. N. ELDER,

Attorney for Potlatch Forests,
Inc.

GEORGE W. BEARDMORE,

Attorney for Potlatch Forests,
Inc.

Received November 8, 1949.

United States of America
Before the National Labor Relations Board
Case No. 19-CA-166

In the Matter of
POTLATCH FORESTS, INC.

and

INTERNATIONAL WOODWORKERS OF
AMERICA, LOCAL 10-364, C.I.O.

DECISION AND ORDER

On September 30, 1949, Trial Examiner Arthur Leff issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to the undersigned three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the In-

intermediate Report, the Respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Potlatch Forests, Inc., and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining or giving effect to any seniority or lay-off policy which discriminates against any of its employees with regard to the order in which they are to be selected for lay-off, or with regard to any other aspect of their employment relationship, on the basis of whether they had or had not engaged in strike or concerted activities, or on the basis of the period during which they had engaged in such strike or concerted activities;

(b) Discouraging membership in International Woodworkers of America, Local 10-364, C.I.O., and its parent organization, International Woodworkers of America, C.I.O., or any other labor organization of its employees, by in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of employment.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post immediately at its Clearwater plant at Lewiston, Idaho, copies of the notice attached hereto, marked Appendix A.¹ Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(b) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the receipt of this Intermediate Report what steps the Respondent has taken to comply therewith.

¹In the event that this Order is enforced by a decree of a Circuit Court of Appeals, there shall be inserted before the words, "A Decision and Order" the words, "Decree of the United States Court of Appeals Enforcing."

Signed at Washington, D. C., this 21 day of December, 1949.

JOHN M. HOUSTON,
Member.

JAMES J. REYNOLDS, JR.,
Member.

ABE MURDOCK,
Member.

[Seal] NATIONAL LABOR
RELATIONS BOARD.

Appendix A

Notice to All Employees

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not maintain or give effect to any seniority or lay-off policy which discriminates against any of our employees with regard to the order in which they are to be selected for lay-off, or with regard to any other aspect of their employment relationship, on the basis of whether they had or had not engaged in strike activities, or on the basis of the period during which they had engaged in any such activities.

We Will Not discourage membership in International Woodworkers of America, Local 10-364, C.I.O., and International Woodworkers of

America, C.I.O., or in any other labor organization of our employees, by in any other manner discriminating against any of our employees in regard to their hire or tenure of employment, or any term or condition of their employment.

All our employees are free to become or remain members of any labor organization. We will not discriminate in regard to tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

POTLATCH FORESTS, INC.

(Employer.)

Dated

By,

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

United States of America, Before the National
Labor Relations Board, Nineteenth Region

Case No. 19-CA-166

In the Matter of
POTLATCH FORESTS, INC.,
and
INTERNATIONAL WOODWORKERS OF
AMERICA, LOCAL 10-364, C.I.O.

July 11, 1949—10:00 A.M.

Met pursuant to notice at 10:00 o'clock a.m.
Before: Arthur Leff, Trial Examiner.

Appearances:

H. J. MERRICK,
General Counsel.

HARRY GEORGE, JR.,
Appearing for the International Wood-
workers of America, C.I.O., Local Union
10-364.

ALBERT HARTUNG,
Appearing for the International Wood-
workers of America, C.I.O., Local Union
10-364.

R. N. ELDER,
Appearing for Potlatch Forests, Inc., Re-
spondent.

GEORGE W. BEARDMORE,

Appearing for Potlatch Forests, Inc., Re-
spondent.

PROCEEDINGS

Mr. Merrick: Well, for the sake of the record I will read into the record what the compliance status of the various locals at this time is. The International organization, their compliance will expire September 17th, 1949. Local 119 is not in compliance and, apparently, there is no intention on their part to effect compliance. Local 358 went out of compliance on August 1st, 1948, and tell me they are attempting to effect compliance; a couple of more affidavits and they will be back in compliance. Local 361 is in compliance until July 25th, 1949. Local 364, the charging party in this particular proceeding, they went out of compliance on June 30th, 1949, and certificate of intent was filed by that local, which grants them an additional ninety days, so, at the present time they are in compliance to Board provisions.

Mr. George: One?

Mr. Merrick: No, two of the four locals are not in compliance. 358 is attempting to effect compliance but they are not in compliance at the present time. It is quite possible they may be in compliance before the next few days are past but at the present time it is my information that they are not in compliance. [11*]

* * *

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Elder: As to the third point which we have set forth in our motion, that the complaint should be dismissed for the further reason that it does not set forth facts sufficient to, or within the meaning of Section 8, sub-section 31 of said Act. We contend, at least, for the purpose of the record, that the complaint must include allegations to the effect that the bargaining agent, the bargaining unit, including the International and the four locals in this case, must show in the complaint that they have complied with the National Labor Relations Act and, particularly, Section 9, sub-sections F, G and H of the National Labor Relations Act, as amended.

Trial Examiner Leff: In other words, it is your contention that that is a jurisdictional requirement of the Act and it is incumbent upon the General Counsel both to plead and prove compliance? [15]

Mr. Elder: That is right.

Trial Examiner Leff: I would have thought that there was considerable merit to your position except that the Board has ruled otherwise. I have had the matter up before and I know that the Board has ruled that it is an administrative matter.

Mr. Merrick: It is an administrative matter.

Trial Examiner Leff: That need not be pleaded or proved, consequently, I shall deny your motion. The record will show my denial of the motion. If you want to raise the matter in court, of course, you have an opportunity to do so. [16]

Mr. Merrick: Well, the charge in this case was filed by Local 10-364 of the C. I. O. on behalf of two of its members who have been, we maintain, unjustly discriminated against and it charges that other I. W. A.-C. I. O. Locals, plus the International organization have been for a number of years the collective bargaining agent for various employees of the Respondent company. In the Spring of '47 after contract negotiations for wage increase were unsuccessful, a strike was called on August 7th, 1947, and this strike lasted until the 13th day of October, 1947, when the Union and the Respondent were able to execute a strike settlement agreement setting out certain conditions under which the strikers will return to their jobs at the Respondent mill. Prior to the end of this strike a great percentage of the original strikers had returned to work through the picket lines and the Company had, of course, hired quite a number of new employees. After the end of this strike on October 13th, 1947, the Respondent inaugurated a so-called return to work policy which, among other things, granted super-seniority to those employees who had returned to work during the strike and which policy, of course, diminished the seniority of those men who had stayed out on strike during [21] the whole course of the strike. By its pleadings the Respondent admits the existence of this policy and, of course, they disagree as to how it came about and, apparently, that is what most of the testimony in this proceeding will involve, as to just how that

return to work policy was inaugurated. It is the contention of the General Counsel that the Respondent, by giving effect to this policy, namely, depriving strikers of their seniority standing in relation to non-strikers or those strikers who went back to work through the picket line, is penalizing them for their concerted activity.

Trial Examiner Leff: Are you relying on the General Electric case?

Mr. Merrick: Yes, sir, I am and, of course, as discrimination against them in regard to their tenure of employment; in regard to violation of 8 (a) (3). We do not allege an independent 8 (a) (1), of course. I think that is about all I have, Mr. Examiner. In other words, that it falls to 8 (a) (3), to prove it. [22]

* * *

Trial Examiner Leff: Mr. Elder.

Mr. Elder: We went into a little bit of the history, it is very short, and I was going to present this later, I didn't know what your procedure was, at the beginning of our case for the purpose of clarifying it as far as the Examiner is concerned and counsel for the government as well as the Union, the operations of the Respondent that are within what we claim the bargaining unit, consist of three sawmill and manufacturing plants located at Lewiston, Coeur d'Alene and Potlatch, Idaho, and two logging operations; one located in the vicinity of Bovill, Idaho, and the other in the vicinity of Headquarters, Idaho, The Company employs approximately 2600 men.

On March 4, 1944, the C. I. O. was first certified as the bargaining agent by the National Labor Relations Board representing the employees in the several plants and logging operations of the Company. On March 10 and 11, 1948, an election was again held by secret ballot and as a result of this election the National Labor Relations Board again certified the C. I. O. as the bargaining agent for the employees of Potlatch Forests, [24] Inc. At the time of this election and certification and at all times previous and since, the International Union had affiliated with it Local Unions 10-119, 10-358, 10-361 and 10-364, each of which have members among the employees in the bargaining unit. Locals 10-119 and 10-358 had not at that time complied with the National Labor Relations Act, as amended, and are not now in compliance with the Act, and, therefore, neither the bargaining agent nor any part thereof is qualified to use the processes of the National Labor Relations Board.

Although no collective bargaining agreement between the Union and the Respondent exists at this time the bargaining agent did enter into a collective bargaining agreement with the Respondent on the first of April, 1945, and on April 1, 1946, which agreement was in effect until May 1, 1948. In all these agreements the Union acknowledged that the true bargaining agent was composed of the International and the four affiliated Locals.

On August 7, 1947, this bargaining agent, including the International and the four affiliated Locals,

called an economic strike of Respondent's employees for the purpose of securing a wage increase. As a result of said strike the employees quit work, left their jobs, and the operations of the Respondent ceased. On August 29, 1947, employees commenced returning to work and on October 10, 1947, some seventeen hundred fifty employees were working in the bargaining unit of the [25] Potlatch Forests, Inc.

It is further the position of the Respondent that on or about October 7, 1947, the officers of the Respondent were approached by officers of the International Union, and that they met in negotiation seeking a settlement and termination of the strike. After several meetings a settlement was reached which provided among other things that employees who had returned to work prior to the settlement would in no instance be displaced by an employee who returned after the settlement. It was agreed that all men returning to work after the strike settlement would be paid the same wage as they were receiving at the time of the strike. They would be guaranteed the same seniority status as far as promotion and vacations were concerned but their seniority would not be protected at the time of any curtailment. It having been agreed that in no instance would an employee returning after the settlement replace an employee who had returned prior to the settlement. This particular question was thoroughly discussed in the meeting between the Union and the Respondent, and it was pointed out

that this provision would have no material effect until such time as there was a major curtailment. As a result of this settlement agreement the men who wanted to return to work did return to work. On October 13, 1947, the pickets were withdrawn from all of the operations of the Respondent.

In accordance with this agreement the Respondent established [26] what has been called the "return to work" policy which has followed strictly the terms of the strike settlement agreement. It guarantees to every employee who returned to work prior to October 22, 1947, the same wage he was receiving prior to the time the strike was called. It protects the seniority of each and every employee as far as promotion and vacations are concerned. It provides that employees who returned to work prior to the strike settlement, in the event of curtailment, cannot be replaced by an employee who returned after the strike settlement.

We will show that the Union officials had knowledge of the return to work policy and that it was set up in keeping with the provisions of the strike settlement agreement. This policy has been followed since the day the strike was settled with full knowledge on the part of the Union.

As to Claude Walters and Gail Cloninger, the return to work policy would have been followed except we will show that the two men were both common laborers and were transferred to other common labor jobs on the plant because of conditions beyond the control of the Respondent. They

refused to accept the transfer and their layoff and loss of time resulted from that refusal rather than from any act of the Respondent.

The true issue in this case is not back pay for these two men but is to determine whether respondent has the right to follow its return to work policy set up in accordance with [27] the provisions of the strike settlement agreement negotiated by the Union officials. [28]

* * *

FRANK GORDON

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination

By Trial Examiner Leff:

Q. What is your full name?

A. Frank E. Gordon.

Q. Where do you live, Mr. Gordon?

A. Route Two, Box 128, Clarkston, Washington.

Q. (By Mr. Merrick): At the present time, Mr. Gordon, what is your occupation?

A. I am a representative of the International Woodworkers of America, C. I. O.

Q. Do you have any title in connection with that job? A. I am an organizer.

Q. How long have you held this job?

A. About three years, approximately three years.

(Testimony of Frank Gordon.)

Q. And where were you employed previous to that time?

A. On the War Production Board.

Q. What are your duties as an organizer for the I. W. A.?

A. My duties here are to do some organizing work and to assist the various Local Unions, principally in the area; principally those in Potlatch Forests. [31]

Q. Then, you are familiar with the operations of the Potlatch Forests Company?

A. That is right.

Q. To your knowledge what labor agreements has your organization had with the Potlatch Forests, Incorporated?

A. The only agreement that I had anything to do with was the 1946 agreement. That is the first one that I had any dealings with.

Mr. Merrick: Maybe I had better put that in at this time, if it please the Trial Examiner. I would like to have the reporter mark this printed copy as General Counsel's Exhibit No. 2 for identification.

(Thereupon the document above referred to was marked for identification.)

Q. (By Mr. Merrick): Is this the particular contract that you referred to, Mr. Gordon (hands paper to witness)?

A. Yes, that is the copy.

Q. And when you started working as an organ-

(Testimony of Frank Gordon.)

izer in this area this was the contract that was in effect between the parties?

A. As I remember, yes. That was run up that year and to my knowledge the one prior, my knowledge of the one before that is very limited.

Mr. Merrick: I would like to offer General Counsel's Exhibit No. 2 in evidence.

Mr. George: Is it the contention of the parties that [32] this copy is a true copy of the original?

Mr. Merrick: There is no dispute. I believe we could not find an original copy and counsel is agreeable to put in this copy.

Mr. Elder: We are admitting the copy.

Trial Examiner Leff: There being no objection, General Counsel's Exhibit No. 2 is admitted.

(Thereupon the document above referred to was received in evidence as General Counsel's Exhibit No. 2.)

GENERAL COUNSEL'S EXHIBIT No. 2

Master Agreement

This master agreement entered into effective this 1st day of April, 1946, between Potlatch Forests, Inc., hereinafter known as the Company, and Local No. 358, Pierce, Idaho; Local 361, Elk River, Idaho; Local 119, Coeur d'Alene, Idaho; and Local 364, Lewiston, Idaho, International Woodworkers of America affiliated with the Congress of Industrial Organizations, hereinafter known as the Union.

(Testimony of Frank Gordon.)

Article I—Recognition

The Company recognizes the Union as the sole collective bargaining agency for its production and maintenance employees as certified by the National Labor Relations Board. It agrees to negotiate with a committee selected by these employees who are members of said International Woodworkers of America, Local 358, Pierce; Local 361, Elk River; Local 119, Coeur d'Alene; and Local 364, Lewiston, their representatives or agents.

Article XIII—Seniority

Section 1

The Company and the Union recognize the principles of seniority in the matter of promotions and retention of job during curtailment, competency considered:

(a) The Company and the Union agree that many job classifications, particularly in semiskilled and skilled work, require certain training, and that in making promotions to such jobs, the Company need consider only the qualified employees who have had such training. Any employee who is promoted shall be given a reasonable trial period. Should he fail to qualify for the position to which he has been provisionally promoted, he shall revert to his former position without prejudice and without any loss of seniority rights.

(b) The Company and the Union agree that

(Testimony of Frank Gordon.)

seniority in a job classification within a department shall date from the first date an employee is permanently rated in such job classification; that seniority within a department itself shall date from the first date an employee is rated within the department; and that seniority in the plant shall date from the date of an employee's last employment by the Company. No seniority in job classification or department shall extend beyond this date of last employment by the Company.

(c) All seniority shall be considered first by job classification, second by department, and last by plant. It shall be used as a basis for preference in shift as well as promotion and in event of curtailment or during slack work periods. An employee demoted shall go back down through the same route by which he progressed.

(d) Any employee who volunteers or is inducted into the armed services of the United States of America during the present national emergency shall accumulate seniority while so serving just as though he had never left the employ of the Company and shall otherwise receive the benefits of federal laws and regulations. This paragraph shall not apply to employees who worked for other companies in the interval between leaving the employ of this company and induction.

(e) The departments for the woods operations and the three sawmill units shall be as set forth in Exhibits attached hereto.

(Testimony of Frank Gordon.)

(f) Any employee who is promoted to a foreman's position shall in the event of curtailment or change of plans by the Company be returned to his former position with full seniority accumulated for the time spent as foreman. The Company has the right to pick or change any foreman without reservation.

(g) All employees who have transferred from one department to another shall retain seniority rights in the department they left, such seniority to be exercised only in event of curtailment.

(h) In times of labor shortage the Company may temporarily divert men or crews from their regular work or even from their regular department, in order to maintain production. In the event of a shortage of work in any department men or crews who are out of work may be temporarily transferred to other available work even in other departments. Unless such temporary transfers shall be for a period of two consecutive weeks or more, no question of seniority shall be involved.

(i) Employees off the payroll for a period of 12 consecutive calendar months shall have no seniority rights, except as provided in Article XI, Section 2. Employees laid off through no fault of their own for a period of more than 12 months shall have prior right to reemployment ahead of new employees in case they can still be reached.

Section 2

(a) It is recognized that the Company has certain obligations to furnish employment for the pur-

(Testimony of Frank Gordon.)

pose of giving training and knowledge of its operations to future salesmen and others. Such training must be of an industry wide nature; and it is agreed that the Company may designate to the Union, certain jobs throughout the various operations which are to be used for this purpose, and that such designated jobs shall be at the entire disposal of the Company to be filled and used by the Company as it sees fit.

The number of such jobs shall not be in excess of the following:

Fifteen jobs for Clearwater Plant.

Ten jobs for Potlatch Plant.

Five jobs for Rutledge Plant.

Ten jobs for Headquarters Woods.

Ten jobs for Bovill Woods.

and shall not be subject to the seniority regulations of this agreement. If the Company at times has no need for some of these jobs, they may be temporarily filled by the Employment Offices, but shall be immediately available to the Company if necessary; and the temporary employees shall have established seniority, but no job rights, through occupancy of that particular job.

Received in Evidence July 11, 1949.

Q. (By Mr. Merrick): Mr. Gordon, could you briefly give us the jurisdiction of the Locals named

(Testimony of Frank Gordon.)

in that agreement in relation to the Potlatch operations?

A. Well, the jurisdiction of Local 119 would be the Rutledge Mill Unit in Coeur d'Alene. The jurisdiction of 358 would be the Clearwater Woods at Headquarters, in the neighborhood of Headquarters, Idaho. And 361 would be the Potlatch Mill at Potlatch, Idaho, the Lewis Mill out of Bovill, Idaho, and the logging operations in and around Bovill, Idaho, and the jurisdiction of Local 364 is of the Clearwater Sawmill Unit at Lewiston.

Q. When you first started to work, then, for the I. W. A. one of your first jobs was the administration of this particular contract, is that correct?

A. Yes, we were working under the agreement. I believe there was an agreement prior to that but one of our first jobs was [33] the drawing up of this 1947 agreement.

Q. Well, in relation to this contract did you take part in any negotiations which looked to making interpretations regarding clauses of that contract?

A. Of this one that has been submitted?

Q. Yes, sir. A. Yes.

Mr. Merrick: I would like to have the reporter mark this document as General Counsel's Exhibit No. 3 for identification. It purports to be an agreement, an agreed interpretation of clauses on which the Union desired clarification. It is dated May 7th, 1947.

(Thereupon the document above referred to was marked for identification.)

(Testimony of Frank Gordon.)

Q. (By Mr. Merrick): Is this the interpretation you referred to?

A. Yes, that is the one.

Q. Is that your signature? Was your signature placed on that document?

A. I think it was. My signature isn't here. I didn't get the copy.

Mr. Merrick: I note that this is, also, a copy. We can't find the original of this agreement and, apparently, the Company can't find theirs, either.

Mr. Elder: We haven't looked because counsel just asked us as to this matter when we sat down here. I would like to [34] reserve our objections so as to check it with the original, if we can find the original we will bring it in to the Examiner and, in the meantime, withhold it with the right to reserve our objections to this.

Trial Examiner Leff: Very well, General Counsel's Exhibit No. 3 will be admitted. If, after checking its records the Respondent finds that it is not an exact copy it may make an appropriate motion to have General Counsel's Exhibit No. 3 stricken from the record.

Mr. Merrick: Do you want to read it at the present time?

Trial Examiner Leff: I think I will glance over it. Please proceed.

Q. (By Mr. Merrick): Mr. Gordon, you might explain what was the purpose of this interpretation meeting?

(Testimony of Frank Gordon.)

A. Well, there were certain clauses in the agreement that had been a source of trouble in our bargaining with the company and it was agreed pretty well between the Company and the Union that it would be helpful to get together and arrive at certain interpretations on various clauses that had caused us some trouble.

Q. Mr. Gordon, do you recall when this 1946 master agreement was opened, that is I am referring, now, to General Counsel's Exhibit 2?

(Thereupon the document above referred to was admitted in evidence as General Counsel's Exhibit No. 3.)

A. What date it was opened?

Q. Yes, for negotiations.

A. Well, it was opened in accordance with its opening date and [35] it would be, negotiations, I believe, were started, the first meeting, I believe, was some time in March prior to the opening date.

Q. That is, you are referring to March, 1947?

A. Yes.

Q. Do you recall if any agreement was reached as a result of these negotiations?

A. An agreement was reached on a late date. However, I cannot recall the exact date that that agreement was arrived at in which the Company and the Union agreed to the re-establishment of the entire working agreement, plus the various interpretations. No, I am wrong about that, to the re-establishment of the agreement with the exception

(Testimony of Frank Gordon.)

of the wage clause, which was held open pending the settlement of the dispute over a differential of 7½ cents between this area and the Coast.

Mr. Merrick: I might clarify matters if I would have the reporter mark this document as General Counsel's Exhibit No. 4 for identification.

(General Counsel's Ex. No. 4 marked.)

Q. (By Mr. Merrick): Handing you General Counsel's Exhibit 4 for identification, is this the agreement that you refer to, (hands paper to witness)?

A. Yes, I would say that that is the agreement, as I remember it.

Mr. Merrick: I would like, also, to offer that in evidence after counsel inspects it. It, also, is a copy. We do not have an original of the particular agreement. [36]

Mr. Elder: We would like, Mr. Examiner, to please have the same ruling on this exhibit, which is General Counsel's Exhibit No. 4, as on No. 2.

Trial Examiner Leff: Very well, General Counsel's Exhibit No. 4 is admitted as subject to the same reservation that was made with respect to General Counsel's Exhibit No. 3.

(Thereupon, the document above referred to was admitted in evidence as General Counsel's Exhibit No. 4.)

Q. (By Mr. Merrick): Mr. Gordon, did a contract result as a result from that conference?

(Testimony of Frank Gordon.)

A. Yes, with the exception of the wage clause.

Q. Well, what happened over that wage clause, will you explain to the Trial Examiner?

A. Well, there were several meetings with the Company between the International negotiating committee, along with representatives of the various Local Unions, which eventually ran into disagreement and a strike resulted.

Trial Examiner Leff: This agreement, General Counsel's Exhibit No. 4, never actually went into effect, is that correct?

A. No, that did go into effect.

Trial Examiner Leff: Including the 7½ cents an hour increase?

A. No, the 7½ cents an hour increase was granted the workers but not the 7½ cents an hour differential. We never did settle [37] that.

Mr. Merrick: I believe that is paragraph, what paragraph is that?

A. I believe there is a paragraph that explains that there, that the contract is held open.

Q. (By Mr. Merrick): You might explain to the Trial Examiner what this differential related to.

Trial Examiner Leff: Is that the only point on which you cannot agree?

A. That is right.

Trial Examiner Leff: And is that what resulted in the strike?

A. That is what resulted in the strike.

Q. (By Mr. Merrick): How long did this strike last?

(Testimony of Frank Gordon.)

Trial Examiner Leff: When did it start?

Q. (By Mr. Merrick): From what date did this strike start, Mr. Gordon?

A. I believe it was August 7th.

Q. 1947? A. 1947.

Q. And how long did this strike last?

A. It lasted until October 13th, 1947.

Q. Now, do you recall what events brought about the end of this strike or how the end of the strike was effected?

A. Do you mean what procedures were followed?

Q. Yes, did you work out a strike settlement or enter into any negotiations with the Company? What was done about it?

A. There was, the strike settlement was arrived at——

* * *

Q. (By Mr. Merrick): Well, I might enlarge on that: did you take part in any of the negotiations looking toward the strike settlement?

A. Yes.

Q. You were not present, of course, when the actual agreement was signed, is that what you mean? A. That is true.

Q. But you did take part in the negotiations looking toward the settlement?

A. That is right.

Q. As a result of these negotiations was a strike settlement [39] effected? A. Yes.

Mr. Merrick: I would like to have this docu-

(Testimony of Frank Gordon.)

ment between the Potlatch Forests, Inc., and the purports to be a copy of a strike settlement agreement between the Potlatch Forests, Inc., and the I. W. A. It bears date of October 12th, 1947, and it has initials typed in at the bottom.

(Thereupon the document above referred to was marked for identification.) [40]

* * *

Trial Examiner Leff: Very well, on the record. With reference to General Counsel's Exhibit No. 5 I understand that Mr. Elder does not dispute that it is an accurate copy of the strike settlement agreement which was entered into on the date mentioned. However, Mr. Elder contends on behalf of the Respondent that that instrument, General Counsel's Exhibit No. 5, does not contain the full strike settlement agreement as it was finally agreed upon. It is his contention that General Counsel's Exhibit No. 5 merely contains a memorandum of the proposed strike settlement agreement which was entered into at that time and that he intends to supplement it by further proof. The General Counsel's representative, on the other hand, contends that that is the full agreement, is that correct?

Mr. Merrick: Yes, that that is the contract.

Trial Examiner Leff: Now, with that understanding I shall [42] receive General Counsel's Exhibit No. 5. Have I stated the understanding correctly?

Mr. Elder: In the beginning of your statement

(Testimony of Frank Gordon.)

you stated it was Mr. Elder's contention that this is a true and correct copy of the strike settlement agreement. I believe you corrected it later but it is our contention that it was a proposed memorandum of a proposed settlement agreement and was not an actual settlement of the strike.

Trial Examiner Leff: It is so understood.

Mr. Merrick: Has this been admitted?

Trial Examiner Leff: Yes, 5 has been admitted.

(Thereupon the document above referred to was admitted in evidence as General Counsel's Exhibit No. 5.)

GENERAL COUNSEL'S EXHIBIT No. 5

As a basis for settlement of the present dispute between the I.W.A. and the Potlatch Forests, Inc., the following is proposed:

1. The Union agrees to withdraw its demands for a 7½c wage increase to eliminate the differential. Wages to remain at rates as of August 6, 1947. Picket lines to be withdrawn as of October 13, 1947.

2. All former employees of the Potlatch Forests, Inc., will return to work without discrimination, on Monday, October 13th. Former employees shall return to work by October 22, to protect their job rights. In the event the job formerly held by the returning employee is not open, the employee will be given other work and receive pay on the basis of the rate paid on his former job.

(Testimony of Frank Gordon.)

3. Men previously on gypo basis will be assigned to gypo work if still available. If gypo work is not available, pay will be at the rate shown in wage schedule for the job.

4. The Company has informed the Union that the night shift of the box factory in the Clearwater Mill, cannot be started at this time, due to business conditions, and for that reason, it may not be able to employ all of the former box factory workers immediately. These box factory workers will be given preference over new employees in filling vacancies in other departments.

5. The present contract will remain in effect without change, except that the following is substituted for the 4th paragraph in Article VII.

“As a condition of continued employment, every employee who confirms, to the Company through the Union, his membership in the Union as of November 20, 1947, or becomes a member of the Union after November 20, 1947, shall be required to maintain his membership in good standing.”

Dates added 10/12/47.

GENERAL COUNSELS—5

C. L. B.

W. B.

O. H. L.

Received in evidence July 11, 1949.

(Testimony of Frank Gordon.)

Mr. George: While they are stipulating, Mr. Examiner, could it be further stipulated as to who those initials are, as only counsel knows.

Trial Examiner Leff: Yes, I think it's a good idea. Who is C. L. B., can you stipulate that?

Mr. George: I think the Company knows.

Mr. Elder: C. L. Billings. He is the General Manager of the Company.

Trial Examiner Leff: And who is W. L. B.?

Mr. Elder: Walter Botkin, that is his name, representing the Union.

Trial Examiner Leff: What was his official position? [43]

Mr. Hartung: Vice-President of the International.

Trial Examiner Leff: Is this his initials?

Mr. Elder: Otto H. Lauschel, Assistant General Manager, and now General Manager of the Company.

Trial Examiner Leff: Now, is it stipulated that this agreement was prepared, this memo was prepared on October 12th, 1947, the date it bears?

Mr. Merrick: Yes, I think the pleadings admit that.

Trial Examiner Leff: Yes.

Q. (By Mr. Merrick): Now, Mr. Gordon, referring to General Counsel's Exhibit No. 5, is this the strike settlement that the membership voted on (hands paper to witness)?

A. Yes, as I remember, that is it.

(Testimony of Frank Gordon.)

Q. Could you explain to us what type of vote was taken in reference to that settlement agreement?

A. Well, I was at several of the meetings, I wasn't at all of them where that was presented, and I will have to admit that I don't remember for sure what method was used in all places.

Q. Well, do you know from your own personal knowledge as to whether or not a vote was taken on this settlement agreement by the membership?

A. Yes, a vote was taken.

Q. And it was accepted by the membership?

A. Yes, it was accepted.

Q. And as a result of this agreement the men returned to work? [44]

A. That is right.

Q. Now, what were your relations with the Company after the return to work? Do you recall any particular grievances arising?

A. Yes, there was a grievance arose shortly after the return to work; one over the re-employment of box factory workers; and one over the employment of some of the railroad employees on the Clearwater Railroad.

Q. Now, what was the dispute regarding box factory workers?

A. Well, as to whether or not, when they were re-employed, they should be paid their regular rate of pay if they were not replaced on their regular job.

(Testimony of Frank Gordon.)

Q. Yes, and what was the dispute relative to the railroad workers?

A. The dispute there was directly over seniority.

Q. Just what were the facts on that, can you tell the Trial Examiner?

A. The men who had gone through the picket line were given rights by the Company over those who had stayed out on strike.

Q. And what protest was made to the Company?

A. There was a grievance filed in regular form under the contract.

Q. Was it processed?

A. It was processed clear through.

Q. All right. What were the results of these grievances? [45]

A. At the time under the agreement when we had completed all the provisions in the agreement for settling disputes, the only thing left was strike, which was out of the question at the time. An investigation was made at that time as to whether or not an unfair labor practice charge could be filed and it was my understanding that information gained from the Board was to the contrary, until such time as we had gotten our certification from the Board.

Q. In other words, at that time was a representation matter pending? A. That is right.

Q. Well, what was the final result of these grievances regarding the seniority rights for the railroad workers?

A. It was, the Union acquiesced under protest.

(Testimony of Frank Gordon.)

Q. In other words, you felt it was not advisable to strike at the time? A. That is right.

Mr. Merrick: I would like to have the reporter mark for identification General Counsel's Exhibit No. 6 for identification. I think we might have them marked en masse. There is a number of grievance forms. They all relate to the railroad department of the Company.

(Thereupon, the documents above referred to were marked for identification.)

Q. (By Mr. Merrick): Handing you General Counsel's Exhibits [46] 6-A through G for identification, can you identify those particular grievance forms (hands papers to witness)?

A. Yes, I can identify them.

Q. You took part in the various grievance meetings held on these grievances? A. I did.

* * *

Trial Examiner Leff: 6-A through 6-G are admitted.

(Thereupon, said documents were admitted in evidence as General Counsel's Exhibits Nos. 6-A, 6-B, 6-C, 6-D, 6-E, 6-F, 6-G, respectively.)

Q. (By Mr. Merrick): You say, Mr. Gordon, no satisfactory settlement was reached on these grievances as far as the Union is concerned, is that correct? A. That is right.

Q. After these grievances were processed, what were your relations with the Company during the rest of '47 and the early part of '48?

(Testimony of Frank Gordon.)

A. That is, in relation to this?

Q. Contract matters, and so forth?

A. Well, during the remainder of '47 and into '48 we had fairly good relations and got along fairly well under the contract until the curtailment at the mill.

Q. Well, now, in '48 were negotiations commenced in the Spring of '48 looking to the writing of a new contract?

A. Yes, that is right.

Q. Can you tell us about those negotiations?

Mr. Elder: When was this?

Mr. Merrick: In the Spring of '48.

A. Well, the negotiations were opened in the regular manner in accordance with the opening clause of the agreement and after numerous meetings we arrived at a proposed settlement, which was submitted to the membership and accepted.

Mr. Merrick: I would like to have this document which purports to be an agreement between the Potlatch Forests Negotiations Committee and the Northwest Regional Negotiating Committee, [48] the International Woodworkers of America, marked for identification as General Counsel's Exhibit No. 7.

(Thereupon, the document above referred to was marked.)

Q. (By Mr. Merrick): Is this the particular agreement that you have reference to, Mr. Gordon (hands paper to witness)?

A. Yes, I believe that is the agreement, as I remember it.

(Testimony of Frank Gordon.)

Q. Did that agreement ever result in the signing of a master agreement, a new master agreement?

Mr. Merrick: Maybe we had better get this in, first. I would like to offer this.

Mr. Elder: I would like, Mr. Examiner, to have the opportunity to check this in the same manner.

Trial Examiner Leff: Very well, it will be received subject to the same reservation.

(Thereupon, the document above referred to was admitted in evidence as General Counsel's Exhibit No. 7.)

Mr. Merrick: Do you care to examine General Counsel's Exhibit 7?

Trial Examiner Leff: I believe I have already received this, General Counsel's Exhibit 5.

Q. (By Mr. Merrick): Now, as a result of this agreement was any contract entered into between the parties?

A. The Union maintains there was, yes.

Q. Well, the answer is hardly responsive. However, what [49] transpired as a result of that agreement?

A. Well, there was an agreement arrived at after this was drawn up to the effect that Mr. Beardmore would have the agreement typed.

Q. Speak a little louder.

A. (Continuing): Would have the agreement typed and with the interpretations which have been

(Testimony of Frank Gordon.)

presented here formally included and put in such form that it could be given to the printers for printing of a new agreement. When that was completed I was designated to meet with Mr. Beardmore and go over this type copy and, if found to be what we had agreed to, sign it and permit its printing. This, of course, was after it had been approved by the membership.

Mr. Merrick: I would like to have this document which purports to be——

Trial Examiner Leff (Interposing): Excuse me. Was it, in fact, approved by the membership?

A. This document that was presented here a moment ago.

Mr. Merrick: No, he is referring to this (indicating).

Trial Examiner Leff: General Counsel's Exhibit 7, was it?

A. Not in that form. The last exhibit was presented to the membership for acceptance.

Trial Examiner Leff: And was it accepted by the membership?

A. It was accepted by the membership. [50]

Trial Examiner Leff: The last Exhibit is General Counsel's Exhibit 7, that is right.

A. (Continuing): On acceptance of that we were to meet and have it put in the form of print.

(Document marked.)

Mr. Merrick: I would like to have this marked for identification as General Counsel's Exhibit 8.

(Testimony of Frank Gordon.)

The document purports to be a master agreement entered into between Potlatch Forests and the I. W. A., CIO and its various Locals. The date of this agreement is the first day of April, 1948.

Q. (By Mr. Merrick): Now, handing you General Counsel's Exhibit No. 8 for identification, Mr. Gordon, is this the agreement that Mr. Beardmore was to send to you?

Mr. Elder: I object to the question. He asked him if it was the contract that Mr. Beardmore was to send to him.

Q. (By Mr. Merrick): Is that the particular contract that Mr. Beardmore sent to you?

A. I believe this to be a copy of the agreement; that this was presented to me in person by Mr. Beardmore.

Q. Was that agreement ever adopted by the membership? A. No.

Q. Why not?

A. The procedure under our method of negotiations, the agreement or proposal as set forth by the committees is what is accepted by the membership and it is the duty of the officers to see that when the agreement is drawn up it conforms with what the [51] membership has voted on.

Q. Well, was that agreement ever adopted by the membership? A. No.

Q. Why not?

A. Because there was an addition made to it.

Q. Would you point out where that addition is on the particular agreement?

(Testimony of Frank Gordon.)

A. It's on the end of the seniority agreement.

Q. What page is that found on?

A. It's on Page 18 of this agreement. Shall I read it?

Q. Yes, would you read what additional addition was made?

A. (Reading): "The strike settlement of October 12th, 1947, shall control application of the seniority article."

Q. And what was the Union's contention regarding that particular provision?

A. That no mention had been made of the strike settlement during negotiations.

Q. So, you refused to sign it?

A. That is right.

Mr. Merrick: I would like to offer General Counsel's Exhibit 8 in evidence.

Mr. Elder: No objection.

Trial Examiner Leff: General Counsel's Exhibit 8 is admitted.

(Thereupon said document was admitted in evidence as General Counsel's Exhibit 8.) [52]

GENERAL COUNSEL'S EXHIBIT No. 8

Master Agreement

This master agreement entered into effective this 1st day of April, 1948, between Potlatch Forests, Inc., hereinafter known as the Company, and Local No. 358, Pierce, Idaho; Local 361, Elk River, Idaho;

(Testimony of Frank Gordon.)

Local 119, Coeur d'Alene, Idaho; and Local 364, Lewiston, Idaho, International Woodworkers of America affiliated with the Congress of Industrial Organizations, hereinafter known as the Union.

* * *

Witnesseth

Article 1—Recognition

The Company recognizes the Union as the sole collective bargaining agency for its production and maintenance employees as certified by the National Labor Relations Board, from the results of the election held March 10 and 11, 1948. It agrees to negotiate with a committee selected by these employees who are members of said International Woodworkers of America, Local 358, Pierce; Local 361, Elk River; Local 119, Coeur d'Alene; and Local 364, Lewiston, their representatives or agents.

Interpretation:

Article 1—Recognition—the first sentence of the first paragraph means the Union is recognized as the bargaining agent for the employees as certified by the National Labor Relations Board for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment as covered by this agreement.

* * *

Received in evidence July 11, 1949.

(Testimony of Frank Gordon.)

Q. (By Mr. Merrick): After this agreement was rejected, Mr. Gordon, what were the relations between the Union and the Company during the remainder of '48 and '49?

A. Well, with the exception of that one particular issue, super-seniority, the contrast was followed out.

Q. What contract are you referring to, now?

A. The one that is marked 1946, with the interpretations thereto.

Q. Did you continue to process grievances between employees and the Company?

A. Yes.

Q. Did you follow the regular grievance procedure set out in the old contract?

A. That is right.

Q. Did the Company at any time contend that the contract no longer applied?

A. Not in any grievances that I remember of.

Trial Examiner Leff: How about the wage scale? Did the Company pay the new wage scale?

A. Yes.

Q. (By Mr. Merrick): Is the Company continuing to recognize the agreement regarding the issue of leaves of absence to the men?

A. Yes.

Q. Is that being done right up to the present date? A. Yes. [53]

Q. Have they ever contended that they do not have to issue leaves of absence? A. No.

(Testimony of Frank Gordon.)

Q. Do the men still get vacations according to the old agreement? A. Yes.

Q. Does the Company still continue to contact you before vacations are given? A. Yes.

Q. What is the procedure that is followed in setting vacations for the men?

A. The procedure that has been followed, that was followed this year which is fresh in my mind: the Company sent a proposal to the Union of their wish as to the date and the Union acted upon it.

Q. And it was adopted by the Company?

A. Yes.

Q. How about the hours of labor in the old contract, are they still adhered to? A. Yes.

Q. Is time and a half still given for work over eight hours? A. Yes.

Q. Does the Union still have shop stewards at the Respondent's mills? A. Yes. [54]

Q. Do they continue to process grievances?

A. Yes.

Q. Does the Company deal with them as shop stewards? A. Yes.

Q. To your knowledge has there ever been any contention that these men no longer have authority to act as shop stewards? A. No.

Q. Referring to General Counsel's Exhibit No. 2, which is the master agreement of '46, referring to Article X classification, is that still followed by the Company, Article X? (hands paper to witness)

A. Yes, it is in accordance with the interpretations of that agreement rendered at that time.

(Testimony of Frank Gordon.)

Q. What rates of pay are paid out there? Do they still follow the rate of pay as set out in the original contract?

A. As far as the Union knows, they do, yes.

Q. Now, referring to General Counsel's Exhibit No. 7, numeral one, that 12½ cent per hour wage increase was that granted to the men this year (hands paper to witness)?

A. Well, those, this was 1948?

Q. Yes. I say, was that wage increase granted?

A. Yes.

Q. Did the Company at any time contend they didn't have to pay it? A. No. [55]

Q. How about this interpretation regarding vacations, has that been followed by the Company?

A. Yes, it has. [56]

* * *

Q. (By Mr. Merrick): Does the Company still continue to follow the policy of allowing the Union to pick an optional holiday, as per the contract?

A. Yes.

Q. Was that followed this year? A. Yes.

Q. Can you tell us the events surrounding that, how it is done, and so forth?

A. Well, the mill took the opportunity of notifying the Company for Decoration Day and did so in accordance with the contract [57] and observed Decoration Day as a holiday this year.

Q. Would you point out the article of the contract that you have reference to, Article Six? (hands book to witness) A. It's Article Six.

(Testimony of Frank Gordon.)

Q. And the Company gave you the holiday you picked? A. Yes.

Q. Now, referring to the logging operation, did they get a holiday?

A. No, because they failed to avail themselves of notifying the Company in time and, consequently, they worked that day regular time at straight time.

Q. Yes. Now, have you continued to precess grievances with the Company during this period?

A. Yes.

Q. Do you take part in those grievances yourself? A. Many of them.

Q. How many have you taken part in during the last year?

A. Oh, I don't know exactly, probably, twenty-five or thirty.

Q. Who do you usually meet with on these grievances proceedings?

A. Well, it depends a lot at what level those grievances are taken where they are settled. In the woods grievances I am generally called into them when they get up to the superintendent's level, and I meet with the woods superintendents and there is times when I have met with the woods foreman.

Q. Regarding the Clearwater operation, who do you usually meet [58] with down there?

A. Well, with the Superintendents' Committee. The Foremans' Committee, I guess, is the first one I have been called in on at any time.

(Testimony of Frank Gordon.)

Q. At any time has the Company refused to negotiate grievances with you?

A. No, not when it was in line with the agreement. [59]

* * *

Q. (By Mr. Merrick): Anyway, in the settling of grievances you follow the contract, is that correct? A. That is right.

Q. And there has never been a contention by anyone that they should be processed in any other manner? A. No.

Q. Now, did you enter into negotiations with the Company this Spring, that is, 1949, looking to the writing of a new collective bargaining agreement?

A. Yes.

Mr. Merrick: I would like to have this marked for identification as General Counsel's Exhibit 9 for identification.

(Thereupon the document above referred to was marked for identification.)

Q. (By Mr. Merrick): Now, Mr. Gordon, handing you General Counsel's Exhibit 9 for identification which purports to be a letter [62] from Potlatch Forests to the various Locals notifying of the intention to negotiate a written agreement, did your negotiations commence as a result of receiving that communication from the Company (hands paper to witness)? A. Yes, they did.

Mr. George: What is the date of that?

Mr. Merrick: January 28th, 1949.

(Testimony of Frank Gordon.)

Q. (By Mr. Merrick): Well, what were the results of those negotiations?

Mr. Elder: Just a moment.

Mr. Merrick: Oh, pardon me.

Mr. Elder: Did you receive this, Mr. Gordon?

A. I didn't receive it. I saw copies of it.

Q. (By Mr. Merrick): What were the results of these negotiations, Mr. Gordon?

Trial Examiner Leff: Well, we haven't ruled on the admissibility of that. Is there any objection?

Mr. Elder: We have no objection.

Trial Examiner Leff: General Counsel's Exhibit No. 9 is received. All right, proceed.

(Thereupon the document above referred to was admitted in evidence as General Counsel's Exhibit No. 9.)

Q. (By Mr. Merrick): What negotiations took place?

A. Well, there were several meetings and at the present time the negotiations are recessed and the calling of a future [63] meeting is in the hands of the U. S. Conciliation Service.

Q. In other words, negotiations have been broken off?

A. No, they are recessed, is all, and pending the calling of another meeting by the U. S. Conciliation Service.

Q. Well, were the parties able to work out any sort of a tentative agreement?

A. We never did agree yet, no.

(Testimony of Frank Gordon.)

Q. Well, what is the particular disagreement?

A. The particular disagreement is the Company's insistence on the inclusion in that contract of a clause giving super-seniority to those who came through the picket lines during our strike.

Q. Was this ever put in any form of writing, this return to work policy?

A. I don't know what you refer to there.

Q. Did the Company ever give you any copy of what their interpretation of the return to work policy was?

A. Well, there was a copy presented to the U. S. Conciliator at our last meeting of negotiations.

Q. Were you present at that meeting?

A. Yes, I was.

Mr. Merrick: I would like to have this document marked as General Counsel's Exhibit 10 for identification. It is entitled "Potlatch Forests, Inc., Return to Work Policy," dated October 12th, 1947.

(Thereupon, the document was marked.) [64]

GENERAL COUNSEL'S EXHIBIT No. 10

October 12, 1947.

Potlatch Forests, Inc.—Return To Work Policy

Employees who returned to work October 13th to 22nd inclusive, 1947, will in case of curtailment, be laid off ahead of employees who returned to work or were hired on or before October 12, 1947 (settlement date). The order of layoff in each group will

(Testimony of Frank Gordon.)

be based on each persons previous seniority rights.

Employees who returned to work on or before October 12, 1947, re-established their previous seniority for all purposes. Employees who returned to work October 13 to October 22, inclusive, 1947, re-established their previous seniority for purposes of curtailment as among this group (returned October 13 to 22, incl.), and for training and promotion among all groups.

Employees who returned to work on or before October 22, 1947, but whose jobs had been filled while they were on strike will be given an opportunity to return to their old jobs at the first opening occurring. If this opportunity is passed up then the employee's rate will revert to the rate of the job he holds and he will have no further right to return to his old job.

When an employee, who is on a job convenience rate, is offered a job equal to or paying more than his old job's rate and this opportunity is passed up the employee's rate will revert to the job he holds but shall be given an opportunity to return to his old job when it is open. If he passes up the opportunity he will have no further right to return to his old job.

When an employee, who is on a job convenience rate, is promoted to a higher paying job and then there is a curtailment he returns to the job his seniority entitles him to and at that job's rate—not at the job convenience rate from which he was promoted.

(Testimony of Frank Gordon.)

Employees who returned to work on or before October 22, 1947 will retain all previous seniority rights for purposes of training and promotion.

Former employees who returned to work after October 22, 1947, will be classed as new employees.

POTLATCH FORESTS, INC.

.....

IWA-CIO

.....

Attest:

U. S. CONCILIATION SERVICE

Received in evidence July 11, 1949.

Q. (By Mr. Merrick): Handing you General Counsel's Exhibit 10 for identification, is this the particular return to work policy that you received from the Company (hands paper to witness)?

A. I believe that to be a copy of what was handed to the Conciliator.

Q. And that copy was never signed by anyone? This is the copy that you got from the Conciliator, is that correct?

(Testimony of Frank Gordon.)

A. Well, I am not sure whether that is a copy or not. There was no signature on the one that I saw, as I remember it. I know there was no Union signature.

Q. Well, do you know what the source of that copy is? A. The Company. [65]

* * *

Trial Examiner Leff: Can the Company agree or stipulate that that was a document which was handed either to the Union or to the Conciliator for transmission to the Union?

Mr. Elder: All right, we so agree.

Trial Examiner Leff: Very well. And that was done on or about October 12th, 1947?

A. No.

Q. (By Mr. Merrick): When did you first see a copy of that [66] return to work policy, Mr. Gordon?

A. At our last negotiations in 1949.

Q. Is that the first time that you saw any written document relative to it? A. No.

Trial Examiner Leff: Well, the record or, at least, the Examiner is confused at this point. Mr. Elder, when you stipulated that this was a copy of the document handed to the Conciliator for transmission to the Union did you have any date in mind when that was done?

Mr. Elder: In 1949.

* * *

Mr. George: Is the record clear on that?

Trial Examiner Leff: Well, the record shows

(Testimony of Frank Gordon.)

that this document, General Counsel's Exhibit No. 10 was handed by the Company, the Respondent, that is, to a conciliator for transmission to the Union during negotiations in 1949. What month in 1949, can you tell us? [67]

A. June, I think.

Trial Examiner Leff: In June of 1949?

A. Yes.

Trial Examiner Leff: What was pending in June of 1949? Were negotiations pending between the Potlatch Forests and your Union?

A. Yes, we were still in negotiations before the United States Conciliation Service.

Trial Examiner Leff: I see.

Q. (By Mr. Merrick): This was the first time that you had ever seen a written copy of this policy?

A. Yes.

Q. Is this why the negotiations were broken off, the dispute over the return to work policy?

A. That is why they were recessed to a further meeting.

Q. Going back to January, '49, do you recall processing a grievance involving Mr. Gail Cloninger?

A. Yes.

Q. Could you give us the events surrounding that grievance procedure and what part you took in them?

A. Well, that was brought about by the curtailment in some of the departments in the mill and Clearwater Unit, that is, I mean in the Clearwater

(Testimony of Frank Gordon.)

Sawmill Unit. Speaking of the Clearwater Sawmill Unit I am speaking of the whole plant, the whole unit, and there were some of the departments curtailed for a [68] time and Mr. Cloninger was, in the opinion of the Union, discriminated against because his full seniority had not been recognized as compared to that of a man who had gone through the picket line.

Mr. Merrick: I would like to have this document marked for identification as General Counsel's Exhibit No. 11. It purports to be a grievance complaint form bearing date of January 3rd, 1949, relating to the Carpenters' Department.

(Thereupon said document was marked for identification.)

Q. (By Mr. Merrick): Mr. Gordon, handing you General Counsel's Exhibit No. 11 for identification, is this the grievance that you processed (hands paper to witness)? A. Yes, it is.

Q. Could you describe just what those various steps are that are named on that grievance form?

A. Well, the first step is taken up with the person, individual, or the individual and a representative of the Union with his immediate foreman. The next step is the shop steward, the employee and the shop steward.

Q. That is step two that you are referring to?

A. That is step two, with the foreman. And in step three it is the shop steward and Foremans'

(Testimony of Frank Gordon.)

Committee and it has been the practice here of both the Company and the Union to bring in other representatives into that at that point if they thought it would help in settlement of the grievance. And step four is the shop committee and the local superintendents' committee.

Q. And what is the final step?

A. The final step is before the U. S. Conciliation Service.

Q. And what was the result of this, the processing of this grievance?

A. Well, we failed to get any settlement.

Q. What decision was reached?

A. A decision was reached to permit the Company to put these men to work under their interpretation with the Union protesting its validity.

Q. Now, referring to step four of General Counsel's Exhibit 11 for identification, it is typewritten here: "Agreed that Cox has seniority over Gail Cloninger due to Cloninger's return to work on 10/14/47," who put that clause in the agreement? The form?

A. The Company.

Q. Did you agree to that?

A. We agreed to that with the stipulation on the other page.

Q. Is that what the word "over" refers to on the bottom of this form?

A. Yes.

Mr. Merrick: At this time, Mr. Trial Examiner, I would like to offer in evidence General Counsel's Exhibit No. 11.

(Testimony of Frank Gordon.)

Mr. George: You are offering it as an exhibit?

Mr. Merrick: I am offering it, now.

Mr. Elder: No objection.

Trial Examiner Leff: General Counsel's Exhibit No. 11 is received.

(Thereupon the document above-referred to was received in evidence as General Counsel's Exhibit No. 11)

Q. (By Mr. Merrick): Incidentally, regarding this particular grievance, at any time did the Company maintain that that they need not process that grievance? A. No.

Q. And how was it processed?

A. The regular way, in accordance with the agreement.

Q. Are those the steps set out in the agreement?

A. Yes.

Q. Now, Mr. Gordon, in your association with the local office of the I.W.A. has it always been the policy of this Local to vote on contracts?

A. Yes.

Q. Do you vote on any contract changes ever made?

A. Yes, anything that changes the general contract.

Q. And how was the membership notified that there is going to be a vote on a particular contract provision?

A. There is written notice put up on bulletin boards around the mill.

(Testimony of Frank Gordon.)

Q. Those notices are put up in the mill? [71]

A. Yes.

Q. Put up in all departments? A. Yes.

Q. And was there a vote on the strike settlement in 1947? A. Well, now of course——

Q. (Interposing): Strike that. I will withdraw the question, I have asked that already.

* * *

Trial Examiner Leff: Did you agree that Cox had seniority [72] over Cloninger on this particular grievance?

A. On that particular grievance we agreed to allow that particular procedure to be used in that particular agreement rather than to strike. That was practically the only thing we could do outside of that, but we retained the right by the statement on the back of that sheet to object to any such use of seniority.

Trial Examiner Leff: You mean, in the future?

A. Yes.

Q. (By Mr. Merrick): You did not acquiesce there?

A. We didn't even acquiesce there, that it was right. We agreed to let it go at that time and the general discussion was to the effect that the only way that that could be determined is through a hearing of this kind, that the Board would have to decide that. [73]

* * *

(Testimony of Frank Gordon.)

Examination

By Mr. George:

Q. Frank, how long have you been a member of the I.W.A. A. Since 1937.

Q. When I first knew you, you were a member of the Columbia Ridge District Council, that is District 5? A. Yes.

Q. And you were an officer at that time?

A. Yes.

Q. And, then, you left there and went to the War Labor Board and were back in with the I.W.A. again? A. Yes.

Q. During all that time did you become familiar with their basic way of collective bargaining?

A. That is right.

Q. And is it not a fact that the officers are never delegated with the authority or power to bind a Union until after the matters they have been working on have been resubmitted to the Union?

A. To ratification by the rank and file.

Q. To ratification by the rank and file? [74]

A. That is right.

Q. And has that policy ever varied?

A. Not that I know of.

Q. Now, since you have been over in this area and in your dealings with Potlatch Forests, Incorporated, has there been any variation of that policy?

A. No.

Q. And the Company is thoroughly aware of that method of conducting your negotiations?

(Testimony of Frank Gordon.)

A. Yes.

Q. Now, back to the question you testified to this morning in regard to this so-called strike settlement agreement, was that matter submitted to the rank and file for agreement, for ratification?

A. Yes. [75]

* * *

Trial Examiner Leff: Would you please identify this strike settlement agreement.

Q. (By Mr. George): Yes, I am referring in particular to General Counsels' Exhibit No. 5?

A. Yes.

Q. Now, Frank, has there ever been any other matter submitted to the rank and file covering the topic of seniority? Has there ever been such an agreement submitted to the rank and file to vote on, bearing on the subject of seniority in any form?

A. No. [76]

* * *

Q. (By Mr. George): Frank, will you tell me what Paragraph 5 refers to in that strike settlement agreement (hands paper to witness)? Read it, first, and then, tell me what it refers to? Read it out loud.

A. (reading): "The present contract will remain in effect without change except that the following is substituted for the fourth paragraph in Article VII." That refers to, I don't know what the number is, it is that exhibit there (indicating), the 1946 contract.

(Testimony of Frank Gordon.)

Trial Examiner Leff: You are referring to General Counsel's Exhibit No. 2?

A. No. 2. [77]

Q. (By Mr. George): Then, there was a contract in existence at that time? A. Yes.

Q. Now, have you submitted to the membership by referendum vote since this thing was signed, this copy that you hold in your hand, any modification of the contract, any changes?

A. Yes, there was the settlement of 1948 negotiations.

Q. I see, but at that time it had to be changed by the vote of the membership? A. Yes.

Q. So you haven't varied from that policy down to the present time, any change in the contract must be ratified by the rank and file before it becomes binding? A. That is right.

Q. I believe you testified that there has never been any super-seniority clause of any type submitted to the rank and file for ratification?

A. Yes.

Q. Now, at the time this strike settlement was being voted on did that paper embody the full matter on which the members were voting? [78]

* * *

Trial Examiner Leff: Were you present when it was voted on? A. Yes.

Trial Examiner Leff: You may answer the question. The objection is overruled.

A. Yes, it embodied the whole thing. It was presented to the membership for their vote.

(Testimony of Frank Gordon.)

Q. (By Mr. George): There was nothing else other than what was on that paper that the members voted on? A. Yes.

Q. Now, just before dinner you were testifying about this discrimination of Mr. Cloninger's, is that his name? A. Cloninger, yes.

Q. You were testifying about this discrimination of Cloninger's and it wasn't clear to me as to what you said in regard to your negotiations with the Company. Now, correct me if I am wrong in this statement: if I understand your testimony you testified this morning that he filed a grievance, that you took this grievance up and you and the Union, I mean, you and the Company could not reach an agreement on it, is that correct? [79]

A. That is right.

* * *

Q. (By Mr. George): Supposing you just tell us in your own words, now, what the facts are in regard to how you left this matter with the Company of Mr. Cloninger?

A. Well, we couldn't agree with the Company's interpretation of the strike settlement as it affected seniority and it was our understanding and definitely understood there that there was no purpose in carrying this to the final point in the agreement and it was left and agreed there that the only way it could be settled is through a Labor Board Hearing, and we just agreed not to carry it any further until such a hearing could be held.

(Testimony of Frank Gordon.)

Q. Let me have this clear: at any time have you ever agreed that the Company could impose their idea of seniority, this super-seniority, as part of the contract? [80] A. No. [81]

* * *

Cross-Examination

By Mr. Elder:

Q. Mr. Gordon, I hand you Exhibit No. 11 (hands paper to witness) and ask you who signed that grievance on behalf of the Union, the settlement of the grievance?

A. That is signed by William Angove, President of the Local.

Q. What is his title?

A. President of the Local Union.

Q. And he actually made the settlement, William Angove?

A. He was the one that signed that.

Q. Did he participate in the settlement?

A. He did.

Trial Examiner Leff: Is he President of the Local at this time?

A. Yes, he is.

Q. (By Mr. Elder): And he actually made the settlement with the Company, Mr. Angove?

A. There was a committee in on this.

Q. And that settlement is what the committee reached as it was signed by Mr. Angove, as President of the Union?

(Testimony of Frank Gordon.)

A. Yes, that is the settlement, with this codicil at the end of it here.

Q. Now, referring you again to General Counsel's Exhibit No. 5, which is the proposed settlement which has been referred to, you say that it was submitted to the Locals and voted on and that you were present at those meetings, is that right?

A. Yes, not all of them. I was present at part of them.

Q. What Local Meetings were you present at?

A. I was present at the Local 364, at 119; at, I think, those two.

Q. And do you know whether the other two approved it? A. Yes, I know.

Q. And before this settlement was agreed upon all of the Local Unions had to approve it?

A. That is correct, yes.

Q. How did they actually go about approving this at the meeting that you attended? Who read it to them or did you read it to them or did you pass it around to them or how did they know what this settlement agreement was all about?

A. It was read in full. Then, it was taken paragraph by paragraph and fully discussed.

Q. It was discussed by whom?

A. Those at the meeting.

Q. Did you discuss it?

A. I don't know as I did. I sat there and listened to the discussion.

Q. Well, who led the discussion at the meetings which you attended? A. Who led?

(Testimony of Frank Gordon.)

Q. Well, who told them about it, the membership? A. Mr. Botkin. [83]

Q. And Mr. Botkin, to your knowledge was he present at the settlement agreement at the time this was settled? A. Yes.

Q. And he told them what the settlement was all about? A. That is right.

Q. You were not present at any of the meetings where the settlement was reached?

A. No.

Q. When did you first find out about the strike settlement agreement?

A. It was presented to the strike committee very shortly after it was handed to Mr. Botkin and Eggers.

Q. That would be about October 13th, or October 12th, I mean, 1947?

A. I presume, I wouldn't say.

Q. To refresh your memory the men went back to work October 13th, which was Monday?

A. I presume it was the 12th, yes, the twelfth day.

Q. Referring to the exhibit which you have in your hand, which is Exhibit No. 5 of the General Counsel and calling your attention to Paragraph II, in the second sentence in Paragraph II, which reads: (reading) "In the event the job formerly held by the returning employee is not open, the employee will be given other work and receive pay on the basis of the rate paid on his former job." When Mr. Botkin explained that and it was [84]

(Testimony of Frank Gordon.)

discussed at your Union meeting, how did they explain, what did that sentence mean?

A. It meant just what it says.

Q. Well, what does it say, in your opinion? I mean, what do you think this means?

* * *

A. Well, I don't remember what was said in respect to that. It is there. I don't know what could be said other than just what is says there.

Q. (By Mr. Elder): At the meeting was the question of seniority discussed? A. Yes.

Q. Did anyone question you or Mr. Botkin as to why the question of seniority was not expressly mentioned in the agreement?

A. That is right.

Q. What did they say to that?

A. It wasn't necessary with what it said in the first part of [85] Paragraph 2. [86]

* * *

Mr. Elder: Well, that is a matter that we are going to argue out later. I was just trying to bring out, and I think it has been established, that no agreement was signed as a result of Exhibit No. 3.

Mr. Merrick: I will concede that there was no other master [91] agreement executed since this one in 1946. That is May 7th, I believe, that one.

Trial Examiner Leff: May 28th.

Mr. Merrick: May 28th is the 1947, it's the next year, I believe.

Trial Examiner Leff: All right, let's refer to it here.

(Testimony of Frank Gordon.)

Mr. Merriek: That is the Negotiating Committee report, May 28th.

Q. (By Mr. Elder): Could you tell me, Exhibit No. 4, General Counsel's Exhibit No. 4 is signed as far as the Northwest Regional Negotiating Committee is concerned, by Ellery Foster, Council Committee, who is that?

A. Ellery Foster was the head of the Educational Department of the International Woodworkers of America at the time that negotiations were published.

Q. And Ray Lea (spelling): L-e-a, what capacity is he?

A. He was a member of the Northwest Regional Negotiating Committee of the International Woodworkers.

Q. And O. D. Armstrong, what position did he hold?

A. He held the same position.

Q. Are they residents of Lewiston or do you know where they live?

A. No, Ray Lea was from District 7. Each district had a representative or an alternative on the Committee.

Q. And Pete Nelson? [92]

A. Just a minute. Mr. Armstrong was from District 10. Pete Nelson, which this is his district here, and Pete Nelson is from District No. 2, which is the Northern Washington District.

Q. What District? A. District No. 2.

Q. Where does that cover?

(Testimony of Frank Gordon.)

A. Northern Washington District Council.

Q. And the Northern Washington Council includes Northern Idaho, does it?

A. No, District 10 includes Northern Idaho.

Q. And Armstrong represented District 10?

A. That is right.

Q. Now, calling your attention to Exhibit No. 3, General Counsel's Exhibit No. 3, the signature appearing on there on behalf of the Union is Fred Seifkin, this is dated the 7th day of May, 1947?

A. He was at that time Secretary-Treasurer of District No. 10.

Q. And Frank Gordon?

A. That is myself.

Q. And Harry Lee?

A. Harry Lee was an alternate, I believe. Anyway, he was from the same district as Ray Lea on the International Northwest Regional Negotiating Committee and was alternating for Ray Lee at this particular time, I understand.

Q. And Chauncey Knoll? [93]

A. Chauncey Knoll at that time was Financial Secretary and Business Agent of Local 364 here in Lewiston.

Q. And William Schwartzman?

A. William Schwartzman was the Secretary-Treasurer of Local 361,—

Q. (interposing): And Hugo—

A. (continuing): Potlatch.

Q. Excuse me. Hugo Wachsmuth?

A. Hugo Wachsmuth was a representative, was representing Local 119, of Coeur d'Alene.

(Testimony of Frank Gordon.)

Q. And Frank Jennings.

A. Frank Jennings.

Q. Yes, sir.

A. He was, I believe, Business Agent at that time of Local 358, at least, he was representing 358 on the Committee.

Q. In other words, Mr. Gordon, all of the Locals were present at the meeting when these interpretations were agreed upon, is that right?

A. I believe they were. Of course, the fact that their signatures are on there doesn't mean that they might have all signed at that date. I believe probably they were, I don't know. I don't remember.

Q. But, actually, all of them had to agree to it before one of the Locals would agree to it, wouldn't they?

A. I imagine so. [94]

Q. I didn't hear your answer?

A. I imagine so, I don't know. There had to be a majority on that. [95]

* * *

(Thereupon the document above referred to was admitted in evidence as Respondent's Exhibit No. 1.)

RESPONDENT'S EXHIBIT No. 1

Master Agreement

This master agreement entered into effective this 1st day of April, 1945, between Potlatch Forests, Inc., hereinafter known as the Company, and Local No. 358, Pierce, Idaho; Local 361, Elk River, Idaho; Local 119, Coeur d'Alene, Idaho; and Local

(Testimony of Frank Gordon.)

364, Lewiston, Idaho, International Woodworkers of America affiliated with the Congress of Industrial Organizations, hereinafter known as the Union.

* * *

Article I—Recognition

The Company recognizes the Union as the sole collective bargaining agency for its production and maintenance employees as certified by the National Labor Relation Board. It agrees to negotiate with a committee selected by these employees who are members of said International Woodworkers of America, Local 358, Pierce; Local, 361, Elk River; Local 119, Coeur d'Alene; and Local 364, Lewiston, their representatives or agents.

* * *

Received in evidence July 11, 1949.

Q. (By Mr. Elder): I hand you Exhibits Nos. 6-A to G inclusive (hands papers to witness), which you identified this morning as being certain grievances, all of which I believe were in [97] connection with the railroad employees, correct me if that is not the right statement?

A. Yes, that is right.

Q. And I believe this morning you testified that you sat in on those grievances?

A. I sat in at the top level, yes.

Q. Yes, now, you note on there that on those

(Testimony of Frank Gordon.)

grievances it says (reading): "Turned over to Mr. Botkin for Union and Mr. Lauschel for Company." What does that mean?

A. Well, I made those meeting calls at which those two people were present.

Q. Is that the usual procedure to follow in a grievance?

A. Well, not under the agreement necessarily. It was merely agreed to at the last step in the contract that they do that. It was as a follow-up on it, I think.

Q. Wasn't it referred to them, actually, Mr. Gordon, for the reason that Mr. Botkin and Mr. Lauschel were present at the strike settlement and that was why it was referred to them for them to determine whether or not the procedure followed was in accordance with the strike settlement?

A. If it was called up for that purpose.

Q. And that is why you referred it to Mr. Botkin for the Union and Mr. Lauschel for the Company, isn't it?

A. That is right.

Q. Were you present at the conciliation resulting after this [98] reference to Mr. Botkin and Mr. Lauschel?

A. Well, it was my impression that the Conciliation Service got ahold of it, first.

Q. Well, were you present at the conciliation meeting? A. Yes.

Q. And at that meeting what, was the strike settlement agreement discussed?

(Testimony of Frank Gordon.)

A. I presume, I don't remember.

Q. Well, why was there a grievance filed on these men, Mr. Gordon?

A. Well, I think it's there. It tells you why.

Q. Wasn't it because of the return to work policy that the Company was operating on?

A. Yes, because of the way they had treated these particular men.

Q. Under their strike settlement agreement?

A. That is right.

Q. So that at the dates of these grievances as shown on the exhibit you had knowledge of the Company's position as far as the strike settlement agreement was concerned on seniority in the event of a curtailment, didn't you?

A. To some extent.

Q. Well, you knew as far as these people were concerned that that procedure was followed, didn't you?

A. Yes, according to what came out in the hearing it wasn't [99] followed exactly the same on all of them, if I remember correctly.

Q. You testified this morning that as far as seniority is concerned, as far as working conditions were concerned, as far as salary was concerned and as far as vacation was concerned everything remained the same except for this return to work policy of the Company, didn't you?

A. I don't know. I wouldn't say just exactly what my answers were this morning.

Q. Let me ask you this question: in the case

(Testimony of Frank Gordon.)

of the men who came back to work after the strike settlement, in the question of promotion in the plant or in any of the operations of the Company is seniority procedure followed as it was prior to the strike

A. As far as I know, it has been.

Q. In Exhibit No. 10 (hands paper to witness), which you testified this morning was to be the return to work policy of the Company, isn't that actually the policy that was followed by the Company in all of these grievances that you have referred to this morning?

A. Well, it's just about the policy, somewhat along these lines.

Q. As a matter of fact, Mr. Gordon, you and the Union have known about this ever since the strike settlement was made that this was the policy that the Company was following, haven't you?

A. We knew that they were following a policy similar to that [100] but they did not follow it in all cases.

Q. What cases didn't they follow that in, that you know of?

A. Oh, gee, I can't call the fellow's name.

Q. Can you give me one?

A. No, I can't call the name. I can get it for you but I haven't got it right here.

Q. But in the majority of instances they followed this policy, didn't they, where there has been a curtailment?

A. Well, I would have to read this thing over. This thing is so long and involves so many things

(Testimony of Frank Gordon.)

that, actually, a lot of things in here the question has never arisen. This, in general, is about what the, during a long period of time the Union surmised that it might be, a policy similar to this, but there has absolutely never been a different statement made to the Union at any time as to exactly what the Company's policy was. There was hints and threats and everything else but never at any time did they come right out and say what the Company policy was and they kept the Union in doubt at all times.

Q. Going back to the conciliation of the railroad grievance, wasn't the policy of the Company stated at that meeting to the effect that men who had gone back to work after the settlement would not replace the men on their jobs that had taken them prior to the settlement in the event of a curtailment?

A. Would you restate that again?

Q. I said, wasn't at this meeting referring to the railroad [101] grievances set up in Exhibit No. 6, at that conciliation meeting wasn't the policy of the Company stated by the Company at that meeting as far as seniority in the event of a curtailment was concerned?

A. I don't remember that it was. I don't remember what the statement was, so, I don't remember whether it would conform to that one or not.

Q. Was there any discussion at that meeting that men who had come back after the strike would not displace a man who had been there taking his job

(Testimony of Frank Gordon.)

prior to the strike, prior to the settlement of the strike?

A. There was. We understood that he would not replace him when he came back to work.

Q. Well, at this meeting, this conciliation meeting when you were objecting to that very thing, didn't the Company state that their policy was that where a man had come back and taken a job on the plant that he wouldn't be displaced by a man who came back after the settlement?

A. There was a settlement made as to these people here in the camps, yes.

Q. Wasn't that the whole argument in that conciliation?

A. It was at that time.

Q. You say that you understood that when a man that had come back prior to a settlement and taken a job, that when the man came back after the settlement he was not to replace that man, [102] you say you admitted that, you knew that?

A. Well, it says so right in your agreement.

Mr. Merrick: I object. I mean, the agreement will speak for itself, as to what the settlement was, as to who will get jobs, and so forth.

Mr. Elder: We again take issue with that in that we do not claim that this memorandum or proposed memorandum, which was not even executed, is the entire settlement agreement.

Trial Examiner Leff: There is one thing that I find some difficulty in following and, perhaps, you will straighten it out before the hearing is over: I

(Testimony of Frank Gordon.)

can't understand how you can have any replacement situation at all. Suppose you have two men, both have been employees, then, they go out on strike together; one comes back before a certain date and the other remains out until after the end of the strike. The one who comes back early, it seems to me, takes his old job back. There is no question of replacement, he doesn't replace the man who is still out.

Mr. Merrick: There were some other employees hired, hired, however, during the strike.

Mr. Elder: There were some other employees hired, which is an issue, also, but the settlement agreement, as we will attempt to prove it, provided that the employees who came back and took their jobs or took other jobs, in other words, the mill had to operate, the setters and sawyers, those jobs had to [103] be filled in order for the plant to operate. The agreement was that those men who took those jobs at the time we settled the strike, it was agreed that those men who had taken the jobs would not be replaced. That is the whole argument. There now comes along a curtailment. The Union admitted, apparently, here by Mr. Gordon that they knew that those men could not be replaced but they now say that where a curtailment comes, why you can be replaced. It is our contention that the agreement was that those men could not be replaced by the men who were coming back to work under the agreement.

Trial Examiner Leff: As of what time, as of the

(Testimony of Frank Gordon.)

curtailment of the strike? I mean, isn't that the time that the displacement would have to take place?

Mr. Elder: No, we are agreeing under the settlement they were withdrawing their pickets and permitting these men to come back to work. The agreement was that those men who were coming back to work would in no wise displace the men who had come back earlier and were operating in the mill. There was an agreement that the wages would remain the same, that the setters who would take some job that was filled, his job was still open but he would take some other job at a setter's wage.

Mr. Merrick: Mr. Examiner, if you recall in Respondent's opening statement, I questioned specifically regarding the settlements of the two employees named in the complaint. I think he stated at that time there was no issue at the time as to the [104] fact that they were reinstated at that time on October 13th.

Trial Examiner Leff: On their old jobs?

Mr. Elder: Not reinstated.

Mr. Merrick: Regardless of that, we will prove it.

Trial Examiner Leff: That is, I wanted to have developed, take, for example, these two people named in the complaint. I would like to know whether when they returned to work after the strike they were given some job other than the one they originally held or whether they were given the job which they held prior to the strike. I think that will clear up the situation for me.

(Testimony of Frank Gordon.)

Mr. Elder: I think that will come out. It can't be brought out from this witness.

Trial Examiner Leff: Yes, very well. I am sorry I interrupted you.

Q. (By Mr. Elder): You testified this morning about the grievance of Mr. Cloninger. The other man in the charge is Walters. Why was no grievance filed on Mr. Walters?

A. Well, there was no necessity of filing any charge on Mr. Walters and we had found that it was useless, so, we just simply added that complaint.

Q. What do you mean, it was useless?

A. Well, judging from what we talked over on Mr. Cloninger's case.

Mr. Merrick: Are you taking the position, now, that there [105] is a contract in existence, I mean, that there was a contract in 1948 and '49?

Mr. Elder: No, I am just cross-examining him in reply to testimony that you brought out.

Trial Examiner Leff: This hearing would be much more orderly if you would address all remarks to me rather than engaging in colloquy with counsel. Just, please, proceed with the cross-examination.

Q. (By Mr. Elder). Did you follow any of the grievance procedure as far as Walters was concerned? A. No.

Q. No grievance was filed on Walters?

A. I don't believe there was anything filed on him, I am not positive.

Q. One other question, Mr. Gordon: you identi-

(Testimony of Frank Gordon.)

fied this morning Exhibit No. 9 as being a letter from the Potlatch Forests, Inc., to the several Locals and the International opening up the written agreement of April 1st, 1946, as modified. Do you know whether or not the Union, also, opened up that agreement by notification to the Company?

A. Well, of course, I didn't have anything to do with that. I think, I know they did but, then, I didn't have the doing of it.

Q. In other words, both the Company and the Union notified each other that they wanted the opening of the contract? [106]

A. Yes, I think so.

Mr. Merrick: I can't find the letter, I think I will stipulate that it was opened.

Q. (By Mr. Elder): I hand you Exhibit No. 8 (hands paper to witness) which is the master agreement which you claimed this morning was submitted to you which you testified that it was never signed. After that was submitted to you, did you have any meetings between the Union and the Company regarding that agreement? A. Yes, we did.

Q. And were you able to reach any agreement on it?

A. It's my remembrance that we didn't reach any agreement on it at all, that is, on that particular part that we objected to.

Q. And, therefore, no agreement of that type was ever signed between the Union and the Company?

A. In this form?

(Testimony of Frank Gordon.)

Q. Yes. A. No.

Q. Well, no agreement in any form was signed after that, was there?

A. Not after this, no.

Mr. Elder: That is all.

Mr. Merrick: My witness? [107]

* * *

GAIL CLONINGER

called and sworn as a witness on behalf of the National Labor Relations Board, testified as follows:

Direct Examination

By Mr. Merrick:

Trial Examiner Leff: What is your full name?

A. Gail B. Cloninger.

Q. (My Mr. Merrick): What is your address, Gail? [109]

A. 1315 Twelfth Street, Lewiston.

Q. Will you speak a little bit louder, too. What is your present occupation, Gail?

A. Truck driver's helper.

Q. And you are employed at Potlatch?

A. Yes.

Q. How long have you worked for Potlatch Forests? A. I started July 24th, 1940.

Q. And what was your job when you first started? With them?

A. I was helper in the box factory.

(Testimony of Gail Cloninger.)

Q. And how long did you stay on that job in the box factory?

A. From July 24th until Army induction in December, the 31st, 1941.

Q. And, then, when did you come back to Potlatch? A. August, '43.

Q. Was that when you were discharged from the Army? A. Yes.

Q. And what job did you get at that time?

A. Oh, rip saw operator.

Q. In what department?

A. The box factory.

Q. And how long did you stay on that job?

A. September of '46.

Q. And, then, what job did you take?

A. I transferred to my present job. [110]

Q. That is in the Carpenters' Crew?

A. Yes.

Q. And were you in that crew at the time of the strike? A. Yes.

Q. And how long were you out on strike?

A. Sixty-seven days.

Q. You stayed out the whole length of the strike?

A. Yes.

Q. Do you recall what date the strike ended?

A. October 13th, '47.

Trial Examiner Leff: I am a bit confused, what is your present job, you say?

A. Truck driver's helper.

Trial Examiner Leff: Is that the job you hold, now? A. Yes.

(Testimony of Gail Cloninger.)

Trial Examiner Leff: And when did you begin on that job? A. October 13th.

Trial Examiner Leff: This year, of '47?

A. 1947.

Q. (By Mr. Merrick): That job is in what crew?

A. That was assigned to the same crew as carpenters and maintenance, ground maintenance.

Q. It was in the same group that you worked with before, the same department?

A. Yes. [111]

Q. What happened when you came back? How did you go about going back to work after the strike?

A. Well, we were told to report to the employment office for assignment, and I was hired out in the employment office. I took that job and, then, go back to the same department.

Trial Examiner Leff: At the conclusion of your strike when you went back to work you got the same job that you held before the strike, is that right, or was it a different job?

A. In the same capacity.

Trial Examiner Leff: Well, was it the same place? A. The same department.

Q. (By Mr. Merrick): You were still a laborer in the Carpenters' Crew, is that correct?

A. Yes.

Q. What events transpired when you went into the Personnel Office on your first day back? Who did you see and what was said, and so forth?

(Testimony of Gail Cloninger.)

A. I talked to the Employment Manager.

Q. Who is that? A. Bob Burger.

Q. And was he the one that reinstated you?

A. Yes.

Q. Was anything said about seniority at that time?

A. Well, there was a discussion about me and another man for this assignment to this job, and I had more seniority than he did. [112]

Q. Who was the other man?

A. John Shoemaker.

Q. Was he a man that stayed out on strike during the whole strike period?

A. Yes.

Q. In other words, you and he had to see who had the greater seniority to get back on the Carpenters' Crew? Is that correct?

A. That is right.

Q. And you were given that job by Mr. Burger?

A. Yes.

Q. When you went back to work October 13th how long did you stay on that crew?

A. Until the curtailment in the department.

Q. Do you remember what date that was?

A. That was January 30th, 1948.

Q. Well, what transpired when you were laid off?

A. Or, rather, December 30th.

Q. December 30th, of '48? What happened when you were laid off, do you recall?

A. Well, we were given the usual, regular layoff slips.

(Testimony of Gail Cloninger.)

Q. Well, who notified you that you were being laid off? A. The foreman.

Q. And who was your foreman?

A. A. L. Jensen.

Q. Well, at any time did Mr. Jensen tell you why you were being [113] laid off?

A. He said there was no work and, then, of course, he laid me off.

Q. Well, was any grievance filed as a result of this? A. Yes.

Q. When was that filed?

A. The following day, December 31st.

Q. Handing you General Counsel's Exhibit No. 11 (hands paper to witness), is this the grievance that you filed? A. Yes.

Q. Now, what was done about this grievance, was a meeting held on it? A. Yes.

Q. When was the meeting held, do you recall? You don't have to be exact on the dates.

A. I think it was January 2nd, '49.

Q. Was it the Monday after you were laid off?

A. Yes.

Q. And who was present at that meeting?

A. Myself and all members here that were in this.

Q. That are named in the grievance?

A. And President Bill Angove and Frank Gordon.

Q. Will you speak a little bit louder. And who was there from the Company?

(Testimony of Gail Cloninger.)

A. A. L. Jensen, we met with him; he was there.

Q. Did you have any conversation with Mr. Jensen that day? A. Yes.

Q. What was the conversation about?

A. We asked him why, how come they were laid off in this manner and he said that is what he was instructed to do.

Q. Did he say who had instructed him to lay you off?

A. He said the employment office.

Q. Did he say anything about strike seniority?

A. Yes.

Q. What did he say?

A. He said, "You fellows haven't got any."

Q. Did he say, "I am laying you off because of that"?

Mr. Elder: I object as a leading question.

Q. (By Mr. Merrick): What did he say about it? Just give us the whole conversation of the strike seniority?

A. Well, we met with the foreman in his office. We asked for this meeting at nine-thirty on that Monday morning, and he said there was nothing he could do about it. The Employment Office told us when we attempted to contact the foreman that it was the foreman's job to look after it, and he said that he would just have to go along with us and take it over to the Employment Office and go into it because it was over his head.

Q. What did he talk about this seniority, now, give us all the details on that, if you can?

(Testimony of Gail Cloninger.)

A. Well, he went into a meeting with the foreman in the [115] Employment Office, went into a meeting with them, and when he came back he said we would have to go through the proper steps, that it couldn't be settled with the employment office here.

Q. When was it that he made the statement about seniority?

A. On that Monday morning.

Trial Examiner Leff: What was the statement again?

Q. (By Mr. Merrick): What did he say?

A. What did he say? He said we didn't have any strike seniority.

Q. That is all he said, then? A. Yes.

Q. Were there any further meetings held on this grievance?

A. Yes, we went in with the Superintendent of Manufacture; he was present.

Q. When was this meeting held, Gail?

A. The same day.

Q. Yes.

A. (Continuing): We asked to go along with it because all us men were waiting to see how this, see what was going on.

Q. Well, did you hold any meetings later on in that week?

A. Yes, we contacted the Plant Manager, Bill Angove, did, and we got a meeting for Wednesday.

Q. Yes.

(Testimony of Gail Cloninger.)

A. That was the 5th of January.

Q. And who was present at that meeting [116]

A. The Plant Manager, the Superintendent of Manufacture, George Beardmore.

Q. Who were these men that were present, now, just identify them?

A. There was George Beardmore and Dave Troy.

Q. What is Dave Troy's job?

A. Plant Manager.

Q. Yes, and who else was present?

A. And Bill Andrews, Superintendent of Manufacture; and Frank Gordon, Bill Angove and myself.

Q. And what was done at this meeting?

A. This discussion was on.

Q. Well, did they give you any reason for your layoff at that time? A. Yes, the same answer.

Q. Well, who gave you this reason, or what was said? Now, what did they say why you were being laid off, do you recall?

A. They said that it was in line with strike seniority.

Q. Who said that? A. Dave Troy.

Q. Dave Troy, and what was his job, again?

A. Plant Manager.

Q. And Mr. Beardmore was present at that meeting? A. Yes.

Q. Was any other reason given why you were being laid off? [117] A. No.

(Testimony of Gail Cloninger.)

Mr. Merrick: Your witness.

Mr. George: No questions.

Cross-Examination

By Mr. Elder:

Q. As I understood your testimony, Mr. Cloninger, you were employed as a truck helper and that is a common labor job, is it? A. Yes.

Q. Carrying a common labor rate?

A. Yes.

Q. And that was prior to the strike you held that job?

A. It was in the same department but I didn't have the same job, but all those labor jobs are in the same bracket. They are optional.

Q. But when you came back after the strike you didn't take the same job that you had before, is that right?

A. I was in the same capacity.

Q. You didn't take the same job?

A. Well, yes, I was on it three or four days before the strike started.

Q. I didn't hear that?

A. There was a man on it three or four days before the strike started and I took his place subject to work anywhere and, then, I was reassigned at that when I went back to work the 13th of October.

Trial Examiner Leff: Will you keep your voice up?

Q. (By Mr. Elder): This may be repetitious but

(Testimony of Gail Cloninger.)

I don't quite understand it: prior to the strike, before you went on the strike you were working as a common laborer, truck driving, is that right, truck driver's helper?

A. Yes, three or four days before I went on strike.

Q. Then, when you came back you took that same job?

A. I was assigned to it, yes.

Q. And all of those jobs, how many jobs were there in the Carpenters' Crew that held the common rate, common labor rate?

A. An estimate?

Q. Yes.

A. About ten.

Q. And you were subject to assignment to any of those jobs?

A. Yes. (nods)

Trial Examiner Leff: Why don't you talk to those gentlemen in the back of the room so then we will all be able to hear. Throw your voice out.

Q. (By Mr. Elder): When you returned to the job, were there other common laborers in that department working, I am talking about the time you came back after the strike settlement?

A. The department I went into?

Q. Yes, in other words, these ten or estimated ten common laborers' jobs, some of those were filled prior to the time you went back, came back, were they not? [119]

A. Yes.

Q. And those men were working on the job at the time you came back?

A. Yes.

Q. Now, getting to this time when the curtailment occurred and you got your layoff notice from

(Testimony of Gail Cloninger.)

the foreman, were you told to report to the Employment Office? A. Yes.

Q. And did you report to the Employment Office? A. Yes.

Q. And did they offer you a job in another department or in any place? A. Yes.

Q. And why did you take that job?

A. I did.

Q. And when did you leave that job?

A. I stayed with it until I had an operation the 15th of February.

Trial Examiner Leff: I am confused at this point. When was this, at the end of the strike?

A. Yes.

Mr. Merrick: No, this was after he had been laid off and got back on again, right?

Mr. Elder: Well, that is what I am trying to bring out.

Q. (By Mr. Elder): At the time you were laid off were you [120] offered a job in another department? A. Yes.

Q. And you took that job? A. Yes.

Mr. George: The time reference when he was laid off, what is the date that you are talking about?

Q. (By Mr. Elder): What date were you laid off? A. Laid off December 30th.

Q. And what job were you holding, then?

A. Truck, helping the truck driver.

Q. And in what department?

A. Carpenters.

(Testimony of Gail Cloninger.)

Q. All right, at that time were you advised that you could have another job in another department?

A. The foreman told me to report to the employment office after New Years, the first working day after New Years, which I did.

Q. And you were assigned at that time?

A. Yes.

Q. And you took that job?

A. After I took these things up to the Union representative.

Q. But you actually had an assignment to a new job the first shift after you were laid off, is that right?

A. Yes, he said I could go to work whenever I had these meetings over with.

Trial Examiner Leff: Speak up, will you?

A. Well, whenever I had these meetings over I was going to go to work.

Trial Examiner Leff: Who said that, the foreman?

A. The employment manager.

Trial Examiner Leff: What meetings?

A. We had these grievances to take up like we were supposed to take up.

Q. (By Mr. Elder): But actually, Mr. Cloninger, you could have gone to work on the first shift, couldn't you, after you were laid off, the first work shift?

A. Yes.

Trial Examiner Leff: Well, why didn't you go to work?

A. We had to arrange for these meetings and get

(Testimony of Gail Cloninger.)

these meetings and meet with the management. I had to be there as the union representative, shop steward, in the department. That is in the agreement.

Trial Examiner Leff: Were you a shop steward?

A. Yes.

Q. (By Mr. Elder): You don't have to lay off to take in a Union meeting, do you?

A. I asked for permission to lay off and it was given to me.

Q. Well, actually, then, you were never out of a job, were you, Mr. Cloninger? A. No.

Trial Examiner Leff: Do you claim any back pay for this [122] witness?

Mr. Merrick: Well, I don't think so. What he has lost is negligible.

Trial Examiner Leff: Who took your place?

Q. (By Mr. Elder): The other man, isn't that right, Gail? A. Yes.

Trial Examiner Leff: This job that you were offered, did that pay the same rate? A. Yes.

Trial Examiner Leff: As a truck driver's helper? A. Yes.

Trial Examiner Leff: When you finally did go back to work after your layoff, what job did you return to?

A. I took a common labor job in the Cutup Department.

Trial Examiner Leff: And where are you working, now?

(Testimony of Gail Cloninger.)

A. Since my operations and everything we started up again in my old department, why, I was reinstated, reassigned to my old job. I am on it, now.

Q. (By Mr. Merrick): In the Carpenters' Department? A. Yes.

Q. (By Mr. Elder): Wasn't there a freeze-up, cold weather, wasn't that the cause of the curtailment in the Carpenters'?

A. I understand that was it.

Q. Since that time you have been reassigned to the Carpenter Department? [123]

A. Yes.

Q. At the time of this curtailment, who took your job? A. A man by the name of Dale Cox.

Q. And what rate did he have?

A. Common laborer.

Q. What rate did he have prior to the time that he took your job? What was he doing?

A. Common labor.

Q. What work was he doing?

A. He was helping carpenters and various work.

Q. Wasn't he a carpenter's helper?

A. It isn't necessarily classed as that.

Q. Now, tell me this, Mr. Cloninger, when did you first learn under this strike settlement agreement that you had all of your seniority rights except at the time of your curtailment?

A. When we went into the meeting with Mr. Troy, the Plant Manager, and Bill Andrews, Superintendent of Manufacture, they told us what it was.

(Testimony of Gail Cloninger.)

Q. You had never heard this, as you call it, this strike seniority ever mentioned until that meeting?

A. Not officially.

Q. Had you heard of it unofficially?

A. Of course, you can hear anything unofficially.

Q. Well, what had you heard around the plant unofficially?

A. I heard, there was rumors to that effect, that there was two [124] kinds of seniority.

Q. And when did you first hear that?

A. Oh, probably, a month prior to our curtailment in the department.

Mr. Elder: That is all.

Redirect Examination

By Mr. Merrick:

Q. I just have a couple of questions. Do you have a classification with the Company? Are you classified in a certain group as far as your job, for example, are you classified as a common laborer?

A. Yes.

Q. Now, before the strike, again, what was your classification? Was it common labor in the Carpenters' Crew?

A. Yes.

Q. And what classification did you return to after the strike?

A. Common labor.

Q. In what department?

A. In the same department.

Q. Now, this man, Dale Cox, that took your job, he actually replaced you in your duties, is that correct?

A. Yes.

(Testimony of Gail Cloninger.)

Q. After you got back on, what department were you assigned to? After your layoff and the processing of this grievance matter?

A. What department did I go to?

Q. Yes. [125]

A. The Cutup Department.

Q. Is that part of the Carpenters' Crew?

A. No.

Q. In other words, you were not returned to the Carpenters' Crew? A. No.

Mr. Merrick: That is all.

Q. (By Mr. George): Do you know what seniority the man had that replaced you that caused you to file a grievance?

A. I know it was less than what I had.

Trial Examiner Leff: Well, that would best be determined by Company records.

Recross-Examination

By Mr. Elder:

Q. Mr. Cloninger, in curtailment of a department like the Carpenter Crew was it customary at the plant for the common laborers to be transferred from one job to another when there was a curtailment due to cold weather or due to some other cause?

A. I had only been in it two years up till then and the year before they didn't have any curtailment, so I wasn't acquainted with the practices.

Q. Are common laborers transferred from one department to the other?

(Testimony of Gail Cloninger.)

A. I had seniority over a man that was maintained.

Q. But isn't it customary on the plant to transfer common [126] laborers from one job to another as the necessity arises?

A. In line with their seniority.

Q. What is the difference between one common labor job and another?

A. Well, if you like to work in a department you like to work in there and you earn seniority by the time you put in. [127]

* * *

Q. (By Mr. Elder): You were not terminated from your job as a result of any seniority, were you?

A. What?

Q. You were not laid off, you didn't lose any time?

A. No.

Q. You didn't lose your job with Potlatch Forests?

A. No. [128]

* * *

CLAUDE WALTERS

called and sworn as a witness on behalf of the National Labor Relations Board, testified as follows:

Direct Examination

By Mr. Merrick:

O. What is your name?

A. Claude Austin Walters.

Trial Examiner Leff: Where do you live, Mr. Walters?

(Testimony of Claude Walters.)

A. Twenty-first and Howard, Lewiston.

Q. (By Mr. Merrick): What is your present occupation, Mr. Walters? A. I am a laborer.

Q. In what department?

A. In the unstacker.

Q. How long have you been employed at Potlatch?

A. Well, it was five years the 6th of May.

Q. In other words, you started May 6, 1944?

A. Yes, sir.

Q. And have you worked on the unstacker all that time?

A. Well, practically all the time.

Q. Well, about how long have you been on the unstacker, do you recall? [129]

A. How long have I been on the unstacker?

Q. Yes.

A. Going on five years, the last five years.

Q. What is the unstacker, anyway?

A. Well, that is where they stack the dry lumber, grade the dry lumber and restack it or regrade it.

Q. Were you working as a common laborer on the unstacker when the strike started?

A. Yes.

Q. How long did you stay out on strike?

A. Full-time.

Q. The whole time? A. Yes.

Q. How did you go about getting back to work, do you recall?

A. Well, they just notified us that the strike was over and we went back on the 13th.

(Testimony of Claude Walters.)

Q. And what job were you given when you went back?

A. I went on the same job stacking six and eight or pulling six and eight, some fellows pulling and some stacking. I don't know what you would call it.

Q. In other words, you were a common laborer on the unstacker? A. Yes.

Q. You were doing the identical job you had before the strike? A. Yes.

Q. How long did you keep that job? [130]

A. Up until I was laid off.

Q. Do you recall when you were laid off?

A. I was laid off the 14th of January on the unstacker.

Q. What were the circumstances surrounding your layoff?

A. Well, the boss just come to me, Carl Rasmussen, come to me and said that he had orders to lay me off.

Q. Did you ask Mr. Rasmussen why you were being laid off? A. Yes.

Q. What did he say?

A. Well, he said if I just come one day during the strike I could have stayed on my job.

Q. What was that?

A. If I just come one day during the strike I could have stayed on my job.

Q. What else did he say?

A. Well, he told me to report to the Employment Office.

(Testimony of Claude Walters.)

Q. Did he give you any other reason why you were being laid off?

A. Well, nothing only I didn't have no right over the other men, that I couldn't bump no other men to hold the rest of the jobs.

Q. Did he give you any reason why you couldn't bump any other men?

A. No, nothing, only it was all on account of the strike, I didn't know what else. [131]

* * *

Trial Examiner Leff: Now, I call your attention to the fact that the witness gave his layoff day as January 14th and that varies from the date set out in the pleading.

Q. (By Mr. Merrick): Are you certain of that date that you were laid off?

A. That I was laid off on the unstacker?

Q. Yes. A. The 14th of January.

Q. What date was that that you were laid off on, do you recall, what day of the week?

A. Well, it was on a Friday.

Q. Yes, well, how long were you laid off, do you recall? A. Well, altogether?

Q. Yes.

A. Well, I was laid off, I believe, the 31st of January till the 10th of March.

(Last answer read.)

Mr. George: The 14th?

Q. (By Mr. Merrick): It's your recollection

(Testimony of Claude Walters.)

that you were laid off January 14th, is that correct?

A. Well, that is as near as I can remember it, yes. [132]

Q. What happened when you were laid off, did you go to the employment office?

A. I went to the employment office and I was transferred from the unstacker, then, to the replant.

Q. That is a different department?

A. That is a different department.

Q. And when did you get put on in the replant?

A. I dumped lumber in the replant.

Q. Well, how many days were you off in between there?

A. I wasn't off at all. That was the following Monday.

Q. You got right on the next Monday?

A. Yes.

Q. And, then, how long did you stay in the replant? A. I was there a week.

Q. Then, what happened?

A. I was laid off.

Q. Why?

A. Well, there was no more jobs that I could take.

Q. Did you have any seniority in the Replant Department?

A. No, I was just there a week.

Q. That was the first time that you had ever been there? A. Yes.

(Testimony of Claude Walters.)

Q. And how long were you laid off, approximately?

A. Well, I was laid off from the 12th around the 20th——

Q. Wait a minute, Claude. [133]

Trial Examiner Leff: Well, was it a week after January 14th? A. Yes.

Trial Examiner Leff: Well, that would make it the 21st?

Q. (By Mr. Merrick): January 21st, then, how long were you off, do you recall?

A. Yes, I was off till the 10th of March.

Q. And, then, what job were you taken back on?

A. I was put back on taking care of the hogs on the unstacker.

Q. Was that a common labor job?

A. That is a common labor job.

Mr. Merrick: That is all.

Direct Examination

By Mr. George:

Q. Do you know whether any of the men that were working after you were laid off in the unstacker department, and these men that were working in the unstacker department, do you know whether they had less seniority than you did?

A. Why, sure.

Q. How do you know?

A. Well, some of them went to work up there. The job that I have always had is taking care of

(Testimony of Claude Walters.)

the six and eights. There is always a man that pushes that six and eight over to you. This man that took my job pushed the six and eight to me before I went off.

Trial Examiner Leff: That was before you went into the [134] Replant Department? You mean when you went to work in the Replant Department, you fix that as of January 21st, now? At that time do you happen to know whether there were any other common laborers in the Replant Department or who had been working anywhere for Potlatch less than you, for a smaller period than you had been working?

A. Not in that department at all.

Trial Examiner Leff: When you went into the Replant Department between January 14th and January 21st, how long had you been working for Potlatch, how many years?

A. How many years?

Trial Examiner Leff: Yes.

A. Well, it would have been five years if it had been up till the 5th of May, the next.

Trial Examiner Leff: Now, were there any other common laborers in the Replant Department during the week that worked there between January 14th and January 21? Were you the only common laborer or were there others?

A. Oh, no, I wasn't. There was others, there was cleanup men and all that was common laborers.

Trial Examiner Leff: Now, referring to the

(Testimony of Claude Walters.)

other common laborers, the cleanup men and others, had they all been there more than five years in the plant working for Potlatch?

A. Well, in the Replant?

Trial Examiner Leff: No, anywhere in the employ of [135] Potlatch?

A. Why, sure, I suppose there were.

Trial Examiner Leff: They had all been there more than five years?

A. Why, no, not all of them.

Trial Examiner Leff: Had there been any there less than five years? A. Why, yes.

Trial Examiner Leff: Can you name them?

A. Why, no, not to call them by name, I couldn't. I don't know their names.

* * *

Q. (By Mr. George): I want to know whether or not the man who took your place on the unstacker department, whether or not he lost any time?

A. Whether the man that took my place did?

Q. Or did he work on through?

A. He went on through. [136]

Q. In other words, there was work to do at your job all the time that you were transferred to the other department and at all the time that you were laid off entirely? A. Yes.

Q. Now, when you were transferred to this new department did you have to start in with new seniority when you got in this new department?

(Testimony of Claude Walters.)

A. Well, I suppose I would but, then, now hold on, on this new department I was just put in there to fill in for a man on his sick spell for a week. You see, I wouldn't be there long enough to get any rights there.

Q. Did you have any rights in any other place in the plant because you had worked five years?

A. Why, yes, all the other jobs, cleanup jobs, the hog job. I think I was rated as five jobs.

Q. Were those all in the unstacker department?

A. Yes, all in the unstacker. [137]

* * *

Q. (By Mr. George): You say, you were out the full time of the strike? A. Yes.

Q. On the picket line?

A. Part of the time.

Mr. George: I see, that is all.

Cross-Examination

By Mr. Elder:

Q. Mr. Walters, as a matter of fact after you left the unstacker and went to the Replant you were offered other jobs and wouldn't take them, weren't you? A. I couldn't take them, Mister.

Q. Why?

A. Because I couldn't get there to the job that they give me.

Q. Weren't you offered about the 20th of January, 1949, a watch job? A. I was.

Q. And why wouldn't you take that?

(Testimony of Claude Walters.)

A. It was because my feet and ankles won't stand walking.

Q. Did you walk on the other job?

A. Not but very little.

Q. Were you on your feet all the time?

A. I was on my feet, yes.

Q. Do you feel that a watch job was harder on your feet than [139] working at the job you were working on?

A. Yes, I did.

Trial Examiner Leff: What is a watch job?

A. That is punching clock and watching over different parts of the plant.

Trial Examiner Leff: It's a watchman's job?

Q. (By Mr. Elder): You have to punch a clock on that?

A. Yes.

Q. And when you refused that job, were you not offered a job picking box in the Replant?

A. No.

Q. Were you ever offered a job that was a night job picking box on the Replant?

A. Yes, a straight job, a straight night job.

Q. And that was about the time that you turned down the watch job?

A. That was after I turned down the watch job.

Q. And why wouldn't you take that job?

A. Because I couldn't, I couldn't see to drive of a night.

Q. Do you drive your own car?

A. No.

Q. Do you travel by bus?

A. No, I travel with the son-in-law.

(Testimony of Claude Walters.)

Trial Examiner Leff: With whom?

A. With my son-in-law. [140]

Q. (By Mr. Elder): Could you ride the bus if you had taken that job?

A. No, there would have been no bus at that time of night to take me.

Trial Examiner Leff: What are the night hours, what are the hours for the night shift?

A. It was three o'clock to eight.

Mr. Merrick: Three in the morning till eight in the morning. A. Yes.

Q. (By Mr. Elder): This picking box at the Replant at night was the regular night shift, wasn't it? A. Yes, I suppose.

Q. And doesn't the bus go right by your home?

A. No.

Q. Doesn't that night shift start at five in the evening? A. Well, I think it does.

Q. It lets out about two, doesn't it?

A. I think so.

Q. Do you remember of telling the Employment Office when you refused that job that you would be back when the weather warmed up?

A. Well, no, I don't know as I did.

Q. As a matter of fact, isn't it true, Mr. Walters—

Trial Examiner Leff: Is that all, did you finish your [141] answer?

(Last answer read.)

Q. (By Mr. Elder): As a matter of fact, didn't

(Testimony of Claude Walters.)

you want to do some building around home that you told the Employment Office that you would just as soon have some time off as long as it was so cold, anyway? A. No, I did not.

Q. Do you remember on March 2nd, 1949, which was after you had turned down this job at night you were offered a cleanup job in the stacker from three a.m. to eleven a.m., a steady job? A. No.

Q. You don't remember that cleanup job that was offered you which was the late shift starting at three in the morning and working till eleven?

A. Yes, but I remember that I just answered that a little bit ago, I couldn't say, I couldn't see to drive at that time.

Q. But the other job was the job that was offered to you in the Replant that was from five to two o'clock? A. Yes.

Q. Then, later you were offered this job, cleanup in the stacker, from three to eleven? A. Yes.

Trial Examiner Leff: How old are you?

A. I am fifty-nine years old.

Trial Examiner Leff: Do you wear glasses?

A. Yes, sir.

Q. (By Mr. Elder): And you were finally offered a job on the dock on March 10th, 1949, and you took that job? A. Yes, sir.

Q. Prior to that time did you apply for a job tending lawns at the plant?

A. I tried to get that job, yes.

Q. And you felt that you could handle that job even with your feet?

(Testimony of Claude Walters.)

A. I thought I could, yes.

Q. You felt that that was less walking than the watch job? A. Yes, I did.

Q. And you are now back in the unstacker?

A. Yes, sir.

Q. When did you go back there?

A. I went back there——

Q. About the 21st of March, 1949?

A. Yes, around about that.

Q. Now, do you work nights in the unstacker at the present time? A. Yes.

Q. How do you get back and forth?

A. I go with the son-in-law.

Q. And what do you do, you work part of the time in the daytimes, how does your shift work out?

A. I work one month daytime and one month nights.

Q. Does your son-in-law work the same hours?

A. He does.

Q. He works in the unstacker, too?

A. No.

Q. But you happen to work the same shift?

A. He works the same shift.

Q. The reason you didn't take these other jobs is because you wouldn't be able to ride with your son-in-law? A. That is right.

Q. Oh, why didn't you file a grievance about this if you felt that you were discriminated against, Mr. Walters?

A. Well, I don't know, I can't answer that.

(Testimony of Claude Walters.)

Q. As a matter of fact, you didn't, it didn't make any difference to you because of this layoff that you had in here?

A. It made no difference to me?

Q. Yes, actually, you were willing to take the time off, weren't you, Mr. Walters?

A. Why, no, of course, I wasn't.

Q. You knew you had a right to file a grievance?

A. I suppose I did, yes.

Q. When you went back after the strike, who was on your job?

A. Who was on my old job?

Q. Your old job.

A. Well, a man, I can't call his name. [144]

Q. There was another man on that job, though?

A. Yes, sir.

Q. And did he stay on that when you were transferred, when you left the department?

A. No, not when I left, he wasn't on there.

Q. He had left the job?

A. He come on after I left this man that has got it, now.

Q. The man that had it, Mr. Walters?

A. The man that had it when I left went on the job that I left. They transferred him to Presto-log house and took the man on the Presto-log house and put on my job. This fellow was trying to do my job.

Trial Examiner Leff: Well, let me get this thing

(Testimony of Claude Walters.)

straight, just before the strike what job were you holding?

A. I was stacking six and eight.

Trial Examiner Leff: Now, when you came back to work after the strike, what job did you get?

A. I stacked six and eight.

Trial Examiner Leff: That is exactly the same job as you held before the strike?

Mr. Merrick: He is talking about this last lay-off, that is what he had reference to.

Q. (By Mr. Elder): I think we had better clarify that for the record, Mr. Examiner.

Mr. Merrick: I think the record is clear. On direct [145] he stated specifically that he had the same job before and after the strike.

Q. (By Mr. Elder): Were there other common laborers in the department? A. Yes.

Q. How many about?

Mr. George: I think the Company's records would be the best on that. You are asking an impossible question.

Trial Examiner Leff: Well, he should know, he was there. How many, that is, in the unstacking department?

A. Yes.

Trial Examiner Leff: How many common laborers were there?

A. Well, there would be about four that I know of.

Q. (By Mr. Elder): Were there any common laborers working there when you came back from the strike after you had been out on strike?

(Testimony of Claude Walters.)

A. Yes.

Q. How many were there, then?

A. Why, all the jobs was full.

Q. All the jobs were full when you came back?

A. Yes.

Q. But you went to work stacking, didn't you?

A. Yes, sir.

Q. But all the other common laborer jobs were filled except yours, except the one you took? [146]

A. Well, I suppose mine had been filled, I don't know.

Mr. Elder: That is all.

Redirect Examination

By Mr. Merrick:

Q. Claude, how old are you?

A. I am fifty-nine.

Q. What is your physical condition?

A. Well, my——

Q. Have you been in good health?

A. Outside of my eyes.

Q. What trouble do you have with your eyes?

A. Well, I don't know.

Q. Well, anyway, prior to your layoff on January 14th, what shifts were you working on? Did you work a day shift one month and, then, a night shift the next month?

A. I think I was working on the day shift when I was laid off.

(Testimony of Claude Walters.)

Q. Yes, but you would alternate, month to month? A. Yes.

Q. And you would ride to work with your son-in-law? A. Yes.

Q. Now, this job that you were offered picking boxes in the Replant, what shift was that on?

A. That was straight night.

Q. Is that in the same department as the——

A. (Interposing): Unstacker, no.

Q. Now, regarding this grievance that you have, you say you [147] did not file a grievance with the Company, is that correct? A. No.

Q. Did you take it up to the Union, though?

A. Yes, why, yes, I asked the Union.

Q. And what did they tell you at the Union?

A. I can't hardly recall what they did tell me.

Q. Well, who do you recall of bringing it up to with the Union? Who was it presented to?

A. Well, I think I talked to Frank Gordon about it.

Q. And you left it in his hands, in other words?

A. Yes, sir.

Q. How about this watchman's job, is that the same shift that you had before? A. No.

Q. What was that, what shift was that?

A. That would be on nights, steady.

Q. Do you know much about this watchman's job? A. No, I never was on it.

Q. To your knowledge is that a job that requires steady walking? A. That is it.

(Testimony of Claude Walters.)

Q. You have to cover a certain area of the plant punching clocks? A. Every hour.

Q. On your old job did you stay in the same place all the time?

A. Well, sometimes I do and sometimes I don't. On my old job [148] I would work backward on the chain, up and down the chain. Well, I wasn't all the time moving up and down the chain.

Q. How long an area is that that you had to cover, though?

A. Oh, I suppose around maybe thirty feet.

Q. And how long had you held that job, how many years? A. About three years.

Q. Yes.

Mr. Merrick: That is about all I have.

Trial Examiner Leff: How about that other job that you were offered, what was it, mowing lawns or something?

A. Yes, I put in application to work on the lawns, yes.

Trial Examiner Leff: Well, didn't that require steady work on your feet, too?

A. Well, I suppose it did but it wouldn't be walking lawns like it would on walks around that mill, would it?

Trial Examiner Leff: I don't know. You prefer to walk on grass?

A. Well, I would if your feet is sore.

Q. (By Mr. Merrick): There would be a lot of work trimming edges and that sort of stuff, wouldn't

(Testimony of Claude Walters.)

it, you could kneel down for that or lay down?

A. Yes.

Recross-Examination

By Mr. Elder:

Q. Would you describe this job that you held for three years which is stacking or unstacking, whichever one [149] you want to call it?

A. Describe it? Tell you what it is?

Q. Yes.

A. Yes, sir, in lumber in the unstacker they call it remanufacture, that is, a board if it is defective on one end, see, they will cut it to a six and eight foot board. Well, that comes around the chain and it is up to me to take care of that, if there was one or a dozen or a hundred.

Q. And these boards are coming down on to a chain, a movable chain, aren't they?

A. Yes, sir.

Q. Doesn't your job make you constantly walk up and down there to keep up with those boards coming through?

A. No, no, why you don't have to keep up with them.

Q. Why is that?

A. There is a place there you can pull them boards off and lay them and when you get enough of them you can make a trip down and pile them.

Q. You are walking between the end and the beginning of this chain all the time, aren't you, Mr. Walters?

(Testimony of Claude Walters.)

A. Well, no, not all the time you are not walking between it, no, you are standing in one place watching them boards. If you know your mark in your boards, why, you know where it is at, where to go.

Q. These boards are all piled in one spot, are they? [150]

* * *

Mr. Merrick: At this time, Mr. Examiner, I would like to have this letter marked for identification as General Counsel's Exhibit No. 12. It's a copy of the letter from Mr. Beardmore, attorney for Potlatch Forests, addressed to Mr. Howard Hilbun, who is a Field Examiner with the National Labor Relations Board in Seattle. This exhibit sets out information regarding Mr. Claude Walters and Mr. Cloninger and what departments they have worked in, their seniority, and it sets out, also, who replaced them when they were laid off, and what their seniority was. I wonder if I might stipulate that that be received in evidence. Also, I would like to point out that we are offering it to show not only the seniority of these men and the seniority of the men who replaced them, we do not acquiesce in the Company's explanation of who replaced them.

Mr. Elder: If he is going to offer it, I think he should offer everything in the letter.

Mr. Merrick: I will offer it for what it may be worth. I think it will show just what is contained in there.

(Testimony of Claude Walters.)

Mr. Elder: We have no objection to the admission of the exhibit.

Trial Examiner Leff: General Counsel's Exhibit No. 12 is admitted in evidence.

Mr. Merrick: And you stipulate that the employment records herein contained are true and correct, according to the Company's payroll records. I am particularly interested in the record of Claude A. Walters, Mr. Paul Slater, who replaced Gail Cloninger, and Dale Cox, who replaced Cloninger.

Mr. Elder: We will stipulate that as far as Mr. Beardmore knew at the time he wrote the letter that that was what the payroll records showed. There may be an error in them. We will produce the payroll records.

Trial Examiner Leff: I will assume that that letter accurately reflects the payroll records until evidence to the contrary is offered by the Respondent.

(Thereupon the document above referred to was admitted in evidence as General Counsel's Exhibit No. 12.)

Trial Examiner Leff: Do you have anything further?

Mr. Merrick: I would like to recall Mr. Gordon to the stand for a few minutes on this question of seniority, if I might.

FRANK GORDON

recalled as a witness on behalf of the National Labor Relations [153] Board, testified as follows:

Direct Examination

By Mr. Merrick:

Q. Mr. Gordon, I would like to call your attention to Article XIII of the 1946 master agreement, which is General Counsel's Exhibit No. 2. Relative to the question of seniority, are you generally familiar with the grievances that you have processed regarding seniority at the plant.

A. Well, I couldn't name them offhand but I am familiar with the majority, the manner in which they are processed.

Q. Now, I would like to hand you a copy of this particular agreement (hands paper to witness) and paying particular attention to Section 1-B, would you attempt to give us the picture of how that provision has operated in the past especially prior to the strike before the question of super-seniority arose?

A. Well, now, it is not in the matter of a definite curtailment as I know of, we have had very few of these cases but the manner in which this was handled was in case of curtailment a man first exercised his seniority on his job, and if there were older employees there on the same job, that is, say, if there were three or four jobs alike and there were older employees in that department having

(Testimony of Frank Gordon.)

seniority over him on that job, he stepped to some other job in that department and exercised his seniority within the department. If he did not have any seniority in the department and was finally pushed out of [154] there, then, he exercised his seniority in the plant and went back the way he came up, is the way the wording is in the agreement. Say that he had been in other departments or other jobs and was pushed out of his department, he would go on to the next highest rated job.

Trial Examiner Leff: Now, let me ask you: supposing a man had been in a department as a common laborer for four years and there was a curtailment and he was junior in point of service, he had the least seniority, in other words, and so he had to get out of his department, now, could he go into another department where there were, also, common laborers and bump some common laborer in another department who had less seniority than he had in the plant?

A. Yes, but he would be forced to exercise it in his department if he could.

Trial Examiner Leff: I don't understand what you mean by that.

A. Well, say that I was working in a department there and I had five years seniority and that five years seniority would hold me there but say that there was another department over here where the fellow had only had six months and I wanted that job, I couldn't hop over there and take that

(Testimony of Frank Gordon.)

job when my job was open over there when I couldn't be displaced there.

Mr. Merrick: Now, what department is the Shook Department? We might stipulate on this, that is not in the same [155] department as the unstacker?

Mr. Elder: It isn't.

Mr. Merrick: It is not in the same department as the unstacker.

Q. (By Mr. Merrick): Now, Mr. Gordon, prior to the time the super-seniority set-up was in force would there be any possible way that a man who had started to work in the unstacker on April 9th, 1947, would there be any possible way that he could bump a man on the unstacker who had started on May 17th, 1944?

A. Off of his own job, you mean?

Q. Yes. A. No.

Q. There was no possible way that he could replace him? A. No.

Q. Prior to the strike?

A. That is right.

Q. Now, what had been the policy prior to the strike regarding a man who, say, was being paid five cents above common labor if he were upon a common labor job, would he be considered classified as a common laborer?

A. I didn't quite get just the sequence there?

Q. Now, I am referring specifically to the case of Mr. Dale Cox, who replaced Gail Cloninger.

(Testimony of Frank Gordon.)

Cloninger started work September 3rd, 1946, in the Carpenters' Crew as a common laborer. He was replaced by Dale Cox in the Carpenters' Crew at common [156] labor, as a common laborer. However, prior to the time that Dale Cox was transferred to that job he had been paid five cents above common labor. Would that be in accordance with your interpretation of the agreement?

A. That he could replace because he was on a higher-paid job?

Q. Yes.

A. And didn't have the seniority?

Q. Yes. A. No.

Q. In other words, the seniority goes by job classification more than by pay scale?

A. That is right.

Q. If you are going to work as a common laborer you have to have seniority for it?

A. If you are going to work you have to have seniority, period; according to the way it has always been handled.

Mr. Merrick: I think that is about all.

Direct Examination

By Mr. George:

Q. This seniority on a plant basis isn't clear to me. Am I to understand that if a man works in more than one department on his way up to his last job and, then, he starts to go back down he has to go back down the same way he came up?

(Testimony of Frank Gordon.)

A. That is true.

Q. In other words, the mere fact that he has five or ten or [157] whatever number of years seniority doesn't mean anything as to jobs and departments that he has not worked in ever?

A. It's pretty, there is nothing spelled out definitely in that respect in this agreement and it has been pretty definitely agreed or, at least, it hasn't been agreed, it has simply been worked that way that when a man finally gets out of his department and has never been employed in any other part of the mill in any other department he is pretty near faced with a common labor job in some other part of the mill on his rate and has to work back up to that.

Trial Examiner Leff: Supposing there are no common laborer's jobs available in the mill at that time?

A. Well, he would still have to take the lowest job that he could bump, according to the way it has been handled in the past. Now, I don't say that that is exactly the Union's interpretation, there has been no agreement arrived at it, but there has been cases settled that way, I understand, here in the mill and there has been no, it isn't spelled out here and there has been no definite settlement in that respect arrived at as to what job a man can lie in if he comes back down. On this type of an agreement the Union's contention is that a man who is a skilled man can work back into another

(Testimony of Frank Gordon.)

job providing he has been hired at the top, that he can work back into another job that he is able to do, the next highest but, however, that has never been spelled out in this agreement nor to my knowledge [158] has there ever been anything that would definitely set the pattern for that particular thing.

Q. (By Mr. George): Let me see if we get it clear, now: you have listed in your contract eight different departments? A. Yes.

Q. Assuming that a man is a common labor man in department number one does he have a call in common labor jobs in any one of those eight departments if his department gets shut down to a place where they don't need common labor?

A. That is right.

Q. He does have a call?

A. You mean, where they don't have common labor at all?

Q. Supposing we take the Manufacturing Department as the starting department, this man is a common laborer in the Manufacturing department and the Manufacturing department closed down to the point where they don't use common labor but there is common labor in the other seven departments, can he go in there and bump men with less seniority than he has?

A. Sure he can.

Trial Examiner Leff: Even though he has never worked there in the other departments?

A. Well, a common labor job is supposed to

(Testimony of Frank Gordon.)

be one that doesn't need any skill and we maintain, yes, he can.

Trial Examiner Leff: He can bump anyone that has seen less service with the Company? [159]

A. There might have been jobs out there that a man will admit he can't do. We maintain a common labor job, a man can bump men in the other department.

* * *

Cross-Examination

By Mr. Elder:

Q. Now, isn't it true in the seniority policy as you interpret it that in a short layoff for curtailment that the Company has no obligation to find——

A. (Interposing): What do you call a short layoff?

Q. Well, say, three days or four days or a week or two weeks, you can qualify your answer? [160]

A. We maintain that in anything over a shift that the Company is supposed to exercise seniority.

Q. Has that been the policy?

A. Well, if you will read the interpretation on the agreement that the Company has maintained that the remainder of a shift when you transfer to another job is all that you can hold as temporary, that that means "temporary," and that we maintain the same thing, if it is temporary, then, a job change of classification is, also, temporary.

Q. How has it actually been operated, though?

A. I think it has been operated pretty much that

(Testimony of Frank Gordon.)

way. We have had numerous cases where there was going to be two or three days that the men get their places if they want them.

Q. Isn't it true that in many instances men are laid off for two or three days and it has been assumed that the work would go on as soon as the weather got better or for some other reason?

A. Pretty much under agreement with the men themselves if they were willing to do so.

Q. But they have done that?

A. It has been done because it was agreeable with the men themselves that they wanted to take some time off.

Q. Where there is a common laborer working in a department and the Company doesn't need him there any more, the need for the job has disappeared for some reason or another, they have a right to transfer him to another department?

A. With his consent.

Q. What do you mean?

A. Under the agreement it says that any man whose job has been temporarily curtailed or, I forget, I will have to read, but there is a clause here that definitely covers that situation and it applies just the same to a common labor man who has been assigned to a department as it does to a skilled labor man.

Trial Examiner Leff: Suppose there were three common laborers in a department and because of a reduction in work the Company finds it only needs

(Testimony of Frank Gordon.)

two in that department, now, can it transfer any-one of the three to another department or must they transfer to the other department in order of seniority?

A. It has always been that seniority has been considered at all times, as far as I know.

Trial Examiner Leff: Is that covered in the contract?

A. Well, we don't consider common labor any different than a job, it says "Your job"; it is covered here very definitely.

Trial Examiner Leff: What particular clause would cover it?

A. I will have to look. I will have to get my glasses out, now, you have went and got me into deep water. I could quote it pretty near but not exact (witness refers to book).

Trial Examiner Leff: 1-b? 1-b? [162]

A. Well, yes, I think that covers it very sufficiently. "The Company and the Union agree that seniority on a job classification within a department shall date from the first date an employee is permanently rated in such job classification; that seniority within a department itself shall date from the first date an employee is rated within the department," and I think that part of it right there would cover common labor as well as anyone else. If he is rated in that department, why, then, that gets him a right to his job. There has been transfers of that nature made and we have always used that basis, of course.

(Testimony of Frank Gordon.)

Q. (By Mr. Merrick): Mr. Gordon, how long does it take a man to become rated in a department?

A. Well, it was the understanding, although there has been nothing that I find written out on the subject, it has been pretty much an understanding of thirty days that they are supposed to try to rate a man in his department.

Q. Well, then, is that what Claude Walters had reference to when he would work one week in the Replant he said he couldn't be rated.

A. No, that is not definitely, that wouldn't be quite the same with a man that is an old employee of the Company. I was thinking of a new employee who under our agreement, it's more or less of an understanding. It seems to me that that was in effect before I ever came here that no one builds any seniority for [163] thirty days with the Company. If they were discharged or quit or anything within thirty days they do not hold any seniority at the plant. Now, unless they are unjustly discharged or something of that kind, but on a old employee going into another department that is a different matter and he could be rated on another job in a place like that in two or three days providing they saw fit to do it. If he was capable of handling the job; however, he was only working in another man's place and, of course, was getting no seniority on that job. [164]

CHARLES J. CUMMERFORD

called and sworn as a witness on behalf of the Respondent, testified as follows:

Trial Examiner Leff: What is your name?

A. Charles J. Cummerford.

Trial Examiner Leff: Where do you live?

A. 1003 Prospect, Lewiston.

Direct Examination

By Mr. Elder:

Q. What position do you hold, Mr. Cummerford?

A. Shipping superintendent.

Q. Of Potlatch Forests, Inc.? A. Yes.

Q. And what unit?

A. Clearwater unit.

Q. And how long have you held that position?

A. Since July 1, this year.

Q. And what position did you hold prior to that?

A. Assistant shipping superintendent and Personnel Director.

Q. How long did you hold that position?

A. Approximately seven years.

Q. And during that time that you were personnel director, [220] did you have in your possession the employment records of all the employees of the Clearwater Unit? A. That is right.

Q. And you handled the personnel and labor relations for the Clearwater Unit?

A. Not labor relations.

(Testimony of Charles J. Cummerford.)

Q. Did you handle the personnel work for the Clearwater Unit? A. That is right.

Q. Are you acquainted with the seniority policy of the Potlatch Forests, Inc.?

A. I believe I am, yes.

(Thereupon Respondent's Exhibit No. 2 was marked for identification.)

Q. (By Mr. Elder): Was the interpretation and the procedure to be followed under the seniority written up, a preliminary draft?

A. It was.

Q. I hand you Respondent's Exhibit No. 2, and ask you to identify that (hands paper to witness).

A. That is the copy.

Q. Of what?

A. Of the interpretation of seniority.

Trial Examiner Leff: The Company's interpretation?

A. That is right. [221]

Trial Examiner Leff: When was that first written up, to your knowledge?

A. To the best of my knowledge it was in October, 1948, that is, approximately, I believe, October, '48, and if I may be allowed to add, that interpretation was first drawn up by a committee in my office, and it was presented to the management to be worked over and revised, and, then, returned to us.

Mr. Elder: We offer Exhibit No. 2.

Mr. Merrick: I will object to it on the basis

(Testimony of Charles J. Cummerford.)

that it is self-serving, and it is, at best, a unilateral interpretation of what the seniority policy of the Company is.

Trial Examiner Leff: May I see it, please?

Mr. Elder: Here is a copy of it (hands paper to Examiner). Before ruling on it, I would like to ask a couple of more questions.

Trial Examiner Leff: Yes.

Mr. Merrick: Also, Mr. Examiner, there is the further objection I would like to point out; on the last page here is attached the return to work policy, which is the alleged oral agreement.

Trial Examiner Leff: Well, as I understand it, this is being offered merely as the Company seniority policy. You are not contending that this was agreed to by the Union?

Mr. Elder: The reason we are offering it is, Mr. Examiner, is because we could bring this out by oral testimony [222] but that the counsel for the Union and the counsel for the Government kept asking us for something in writing, yesterday as to our policy. This is our policy.

Q. I would like to ask the witness before ruling, for what purpose did you make up this Respondent's Exhibit No. 2?

A. To interpret the Company's policy of seniority.

Q. For what purpose?

A. For lay-offs and promotions, and everything regarding anything that seniority is used for.

(Testimony of Charles J. Cummerford.)

Trial Examiner Leff: Who actually prepared this?

A. Who actually prepared that?

Trial Examiner Leff: Yes, the writing, who drafted it?

A. The first draft was made by a committee from my office.

Trial Examiner Leff: Were you on the committee?

A. I was. We turned it over to the management, and the management held meetings on it. I don't know just what type of meetings. It was revised, some revisions made in it, and returned to us.

Trial Examiner Leff: And when you refer to "management" whom do you mean, specifically?

A. The plant managers of the various units.

Trial Examiner Leff: What material sources did you use in drafting this?

A. Well, all the information that we have in my office regarding just such things as seniority and the policy as set [223] up in the agreement between the Company and the Union.

Trial Examiner Leff: Well, you didn't rely entirely on the agreement, did you?

A. To draw that up?

Trial Examiner Leff: Yes.

A. Why, yes, except the strike settlement.

Trial Examiner Leff: Well, you didn't find that a copy had been signed by the Union?

A. No, that is right.

(Testimony of Charles J. Cummerford.)

Trial Examiner Leff: Do you press your objection?

Mr. Merrick: Well, not if that is the only limited purpose that it is offered for.

Trial Examiner Leff: Do you have any objection, Mr. George?

Mr. George: Yes, I would like to have an objection that it is a self-serving document, and, too, that it is an attempt, the document tends to violate the parol evidence rule as to matters that are in evidence.

Trial Examiner Leff: Well, since this is offered merely as reflecting the Company's interpretation of its seniority policy, I will accept it for that purpose. Respondent's Exhibit No. 2 is admitted.

(Thereupon, the document above referred to was admitted in evidence as Respondent's Exhibit No. 2.) [224]

RESPONDENT'S EXHIBIT No. 2

Potlatch Forests, Inc.

Seniority—Interpretations and Operation

Article XIII, Section 1 and 2

The seniority clause of the master working agreement states that all seniority shall be considered first, by job classification; second, by department; and third, by plant. It shall be used as a basis for preference in shift as well as promotion and

(Testimony of Charles J. Cummerford.)

Respondent's Exhibit No. 2—(Continued)
in event of curtailment or during slack work periods. In both promotions and retention of jobs competency can be considered as well as length of service.

The definitions and factors making up our interpretation of our seniority system are as follows:

I. Definitions:

A. Plant seniority shall date from the date of an employee's last employment by the company. Loss of time for any of the following reasons is considered time worked for computing plant seniority:

1. Military Service (Selective Service Act);
2. Granted leaves of absence for personal reasons; for work with company contractors at company request; and for union officials.
3. Illness.
4. Accidents.

B. Department seniority shall be the actual number of days in the department plus temporary transfers at company request.

C. Job seniority will start when an employee is permanently rated in a permanent job opening or in a job line defined in the progression schedule effective in the department.

(Testimony of Charles J. Cummerford.)

Respondent's Exhibit No. 2—(Continued)

D. Permanently rated means to hold a job for sixty days or being rated as qualified for that job by the foreman in less than 60 days.

II. Transfers:

A. Permanent-Employee Request for job that is open

1. Within Department

- a. Plant seniority—no effect unless department seniority is equal.
- b. Department seniority—preference for job line. Preference for new jobs created in department.
- c. Job seniority—no effect.

2. Within Plant

- a. Plant seniority preference for job openings in new department, competency considered preference for job openings in all departments if no employee available in the department.
- b. Department seniority—no effect.
- c. Job seniority—no effect.

B. Temporary—Company Request.

1. Plant seniority is accumulative.
2. Department seniority is accumulative in regular department of temporary assignment.

(Testimony of Charles J. Cummerford.)

Respondent's Exhibit No. 2—(Continued)

3. Job seniority is accumulative in regular job and gains seniority in job of temporary assignment.

III. Promotion:

A. Within department

1. Plant seniority has no effect unless department seniority is equal.
2. Department seniority operates for preference for a job opening in a line of progression.
3. Job seniority operates for preference for upgrading in the same line of progression.

B. Within plant

1. Plant seniority operates for preference for job openings in new departments considered. Preference for job openings in all departments if no employee available in the department, competency considered.
2. Department seniority—no effect.
3. Job seniority—no effect.

IV. Curtailment:

A. Permanent (Elimination of job or prospective lack of work for 30 calendar days or more).

1. Plant seniority operates for preference for any base job in unit.

(Testimony of Charles J. Cummerford.)

Respondent's Exhibit No. 2—(Continued)

2. Department seniority operates to retain job in department.
3. Job seniority operates to retain a job in a job rate classification if department seniority is sufficient to hold job in department.
4. Strike seniority
 - a. Men who returned to work October 13 to 22, inclusive, 1947, will in case of curtailment be laid off ahead of men who returned to work or were hired on or before October 12, 1947 (settlement date). The order of lay-off in each group will be based on each person's previous seniority rights. (See attached "Return to Work Policy.")

B. Temporary (Prospective lack of work for less than 30 calendar days).

Plant, department and job seniority may be disregarded in case of a shortage of work or men.

V. Personal sickness and accidents:

Plant, department, and job seniority accumulates during such absence.

VI. Leave of Absence:

Plant, department and job seniority accumulates during absence.

(Testimony of Charles J. Cummerford.)

Respondent's Exhibit No. 2—(Continued)

VII. Shift Preference:

A. Plant seniority has no effect unless department seniority is equal.

B. Department seniority operates for preference in departments that do not rotate shifts.

C. Job seniority operates for preference in departments or on jobs which do not rotate.

VIII. Foremen's Seniority:

Plant, department and job seniority accumulates for time spent as a foreman.

IX. Student Lumber Salesmen:

There is no seniority for these employees, unless dropped as student lumber salesmen. In case they are dropped, the plant, department and job seniority is picked up and credited.

X. Overtime:

A. Plant seniority—no effect.

B. Department and job seniority will operate to rotate overtime in the department or job with the oldest man first.

XI. Women Employees:

A. Plant seniority will operate for retaining a job on designated jobs within designated departments in case of curtailment.

(Testimony of Charles J. Cummerford.)

Respondent's Exhibit No. 2—(Continued)

B. Department seniority will operate for promotion to or retaining of designated jobs in department.

C. Job seniority will operate for transfer or promotion to designated jobs within department.

XII. Box Factory:

Plant seniority will not accumulate unless employee is or had been permanently rated on a job equal or higher than base rate of plant.

Potlatch Forests, Inc.—Return-to-Work Policy

Employees who returned to work October 13th to 22nd, inclusive, 1947, will, in case of curtailment, be laid off ahead of employees who returned to work or were hired on or before October 12, 1947 (settlement date). The order of layoff in each group will be based on each person's previous seniority rights.

Employees who returned to work on or before October 12, 1947, re-established their previous seniority for all purposes. Employees who returned to work October 13 to October 22, inclusive, 1947, re-established their previous seniority for purposes of curtailment as among this group (returning October 13 to 22, incl.), and for training and promotion among all groups.

(Testimony of Charles J. Cummerford.)

Respondent's Exhibit No. 2—(Continued)

Employees who returned to work on or before October 22, 1947, but whose jobs had been filled while they were on strike, will be given an opportunity to return to their old jobs at the first opening occurring. If this opportunity is passed up then the employee's rate will revert to the rate of the job he holds and he will have no further right to return to his old job.

When an employee, who is on a job convenience rate, is offered a job equal to or paying more than his old job's rate and this opportunity is passed up the employee's rate will revert to the job he holds but shall be given an opportunity to return to his old job when it is open. If he passes up the opportunity he will have no further right to return to his old job.

When an employee, who is on a job convenience rate, is promoted to a higher paying job and then there is a curtailment he returns to the job his seniority entitles him to and at that job's rate—not at the job convenience rate from which he was promoted.

Employees who returned to work on or before October 22, 1947, will retain all previous seniority rights for purposes of training and promotion.

Former employees who returned to work after October 22, 1947, will be classed as new employees.

Received in Evidence July 12, 1949.

(Testimony of Charles J. Cummerford.)

Trial Examiner Leff: Is that the first time you prepared anything in writing as to the seniority policy?

A. I prepared anything? That is the first time I prepared anything.

Trial Examiner Leff: Was there any writing in existence prior to that time?

A. Regarding what?

Trial Examiner Leff: The seniority policy.

A. The seniority policy prior to the strike?

Trial Examiner Leff: No, regarding the Company's interpretation of the seniority policy?

A. I believe so, I don't believe there has been anything written up as far as I know.

Q. (By Mr. Elder): After the strike settlement, Mr. Cummerford? After the strike settlement which was dated, the return to work was October 14, 1947, was the policy as to seniority written up?

A. A policy of the strike settlement?

Q. Yes. A. Yes, it was.

Q. I call your attention to the attached exhibit, A, on Respondent's Exhibit 2 (hands paper to witness) and ask you if that is the policy that was written up, and when that was written up?

Trial Examiner Leff: If he knows. [225]

Q. (By Mr. Elder): If you know, approximately.

A. Yes, that is the copy, and that was given to us on the morning of October 13th.

(Testimony of Charles J. Cummerford.)

Q. 1947?

A. 1947, at the Clearwater Unit, by Mr. Troy, plant manager, at a meeting held and called by him, of all the supervisors on the plant.

Trial Examiner Leff: On the morning of October what?

A. 13th.

Q. (By Mr. Elder): And that meeting was composed of who?

A. The supervisors of the plants.

Q. Now, Mr. Cummerford, will you explain for the purpose of the record, the difference between the seniority policy which has been referred to here as prior to the strike settlement, and the seniority policy after the strike settlement?

A. That is regarding?

Q. Promotion, vacations, the entire set-up.

A. The seniority set-up prior to the strike was based entirely on job, department and plant seniority. All promotions, vacations, and so forth, were based on the actual time on the plant, in the department, and on the job. After the strike, according to the strike settlement, all employees who returned prior to October 13th, guaranteed their jobs over the employees who returned after October 13th. In other words, any man on any job prior to October 13th was given the [226] right to hold that job, and on promotions, the promotion of men, the strike settlement had no effect on promotion whatsoever. All men had their seniority

(Testimony of Charles J. Cummerford.)

prior to the strike, and any promotions they were given, their jobs, the promotional jobs, and that occurred in a good many instances.

Trial Examiner Leff: Let me ask you this point, so that I get it clear: Did you participate in the strike settlement personally?

A. In my job——

Trial Examiner Leff (Interposing): Well, now, did you?

A. No, I did not.

Trial Examiner Leff: So that all you know about the strike settlement would be hearsay? In other words, would be something that was told to you by one or more other people?

A. That is right.

Q. (By Mr. Elder): After October 13th, 1947, the return to work policy as set forth in Respondent's Exhibit 2, was followed by your office?

A. Absolutely.

Trial Examiner Leff: What is the significance of that October 22nd date, do you recall? Is it something about all those who returned between October 13th and October 22d?

A. Would be guaranteed the right as set forth in the settlement. After that date they were no longer employees.

Trial Examiner Leff: I see.

Mr. Merrick: Apparently, they gave them ten days. [227]

A. To return to their jobs.

(Testimony of Charles J. Cummerford.)

Q. (By Mr. Elder): And the instructions that you received, what was your understanding of that strike settlement as to the seniority? From the instructions you received as Personnel Director, what was your understanding of the strike settlement agreement as to seniority?

Mr. George: I will object to that.

Trial Examiner Leff: Sustained.

Q. (By Mr. Elder): What was the difference between the seniority prior to the settlement of the strike and after the settlement of the strike?

A. The only difference was the men who returned prior to October 13th; their rights were guaranteed, and men who returned after October 13th, they were guaranteed the job if the job was open, and if not, they were paid at the rate of pay that they were on prior to the strike, and any promotions that come up after that, or any openings in that job, they were given the first chance.

Q. Could they bump a man who had returned prior to the settlement? A. No.

Q. What effect did this seniority policy have in the event of a curtailment in the plant?

A. It would have the same exact effect as—would you repeat that? [228]

(Last question read.)

A. The men who had returned through the picket lines, jobs would be held them, given them, over and above the men who had not returned.

(Testimony of Charles J. Cummerford.)

Q. And that was your understanding of the strike settlement? A. That is right.

Trial Examiner Leff: When you say it was your understanding of the strike settlement, do you mean that that was reported to you?

A. Through this written report, yes, through many discussions.

Q. I call your attention to the lay-off in which Gail Cloninger was laid off due to a curtailment in the carpenter shop, as shown in the record here, and ask you if you are acquainted with Cloninger and acquainted with the lay-off that occurred on December 31, 1948? A. I am; yes.

Q. December 30th? As Personnel Director, did you determine the policy to be followed in that lay-off? A. I did; yes.

Q. And will you tell the Examiner what that policy was?

A. Connected with Cloninger particularly, or the over-all policy?

Q. Yes. I will withdraw that question. First, Mr. [229] Cummerford, tell me what caused this lay-off in the carpenter crew?

A. On account of the extreme cold weather there was no work on the carpenter crew that could be performed, and it was necessary to curtail.

Q. And why was Mr. Cloninger laid off?

A. Because his seniority would not permit him staying on the carpenter crew.

Q. And I understand by that, by the answer

(Testimony of Charles J. Cummerford.)

to that question, that there was a partial curtailment of the carpenter crew?

A. Just a partial curtailment, yes.

Q. And was Mr. Cloninger referred to your department? A. He was.

Q. And what happened to him there?

A. As soon as he reported to the department, the Employment Manager informed him of another job which he might go on immediately.

Q. And why didn't he take that job?

A. To the best of my knowledge, he was preparing grievance forms to take up in the regular procedure.

Q. And when did he take that job?

A. I believe January 6th, I am not too familiar with the records. It is just what he reported to me.

Q. I call your attention to Claude A. Walters, who was employed in the unstacker department, and was laid off on [230] January 18, 1949. Do you remember that case? A. Yes, I do.

Q. What was the reason for that lay-off?

A. We discontinued the remanufacturing in the unstacker department, and the job on which he was employed was connected with that job, with that operation.

Q. And did you handle the seniority policy as far as the lay-off in that department was concerned? A. I did.

Q. And why was Walters laid off?

(Testimony of Charles J. Cummerford.)

A. Because he didn't have sufficient seniority to maintain his job.

Q. And when he was laid off in the unstacker department, what happened to him?

A. He was offered other jobs, and it was called to my attention when this was to take place, and, then, I instructed the Assistant Personnel Director to line him up another job, which he did, and it was reported to me that he did not take the job, except a job in the replant, four days, I believe that he worked, and, then, other jobs were offered to him, and he would not accept. After about two weeks' time, I would say, Mr. Angove and Mr. Gordon approached me regarding Claude Walters, for discussion, which we usually do in regard to all cases of that kind, and wanted to know why Mr. Walters was not put on a job. I explained to him exactly what took place, [231] the jobs that were offered to him, and Mr. Gordon and Mr. Angove agreed with me at that time that sufficient had been done to give Walters a job.

Q. No grievance was filed with you?

A. No grievance was filed.

Q. The policy that you followed as far as seniority is concerned on October 13th, 1947, and since as set up in the return to work policy, or what has been designated return to work policy, and is attached to Respondent's Exhibit No. 2, is that the same policy that you used in preparing the interpretation and operation of seniority, which is Respondent's Exhibit No. 2?

(Testimony of Charles J. Cummerford.)

A. That is right.

Mr. Elder: You may inquire.

Cross-Examination

By Mr. Merrick:

Q. How long were you Personnel Manager, Mr. Cummerford?

A. Approximately seven years.

Q. And when did you leave that job?

A. July 1 of this year, 1949.

Q. In other words, you were in charge of seniority and personnel relations all during the strike period and the post-strike period?

A. That is right.

Q. Now, you state that Respondent's Exhibit 2 was prepared [232] about October, 1948?

A. That is right.

Q. You say you prepared it?

A. We made the first draft.

Q. Who was present when this draft was made?

A. It was Earl Bullock.

Q. Would you identify these people as you name them? Identify them as you name them.

Trial Examiner Leff: By reference to the position.

Q. (By Mr. Merrick): Yes, who are they?

A. Earl Bullock at the present time is public relations manager.

Q. Yes?

(Testimony of Charles J. Cummerford.)

A. Bob Burger at that time was employment manager.

Q. Yes?

A. And I believe that is all; there was just the three of us drew up the first draft.

Q. Was there any reason why you waited one year to prepare it, after the strike?

A. Not particularly, no.

Q. Do you take part in the usual grievance procedures?

A. No, not as Personnel Director, I didn't. I do now as Assistant Superintendent.

Q. Were you familiar with the grievance with regard to the railroad work shortly after the termination of the strike? [233]

A. No, I was not.

Q. Do you know if a copy of this was ever given to the Union?

A. Not to my knowledge, it wasn't.

Q. Do you think one should have been given to the Union?

Mr. Elder: I object to the question.

Trial Examiner Leff: Sustained.

Q. (By Mr. Merrick): Did Mr. Green know of this seniority policy? A. Yes.

Q. Now, when did you first see a copy of this return to work policy, as written up here?

A. When did I first see the copy?

Q. Yes.

A. The 13th morning, the 13th of October.

(Testimony of Charles J. Cummerford.)

Q. And was that prepared on the 13th?

A. I couldn't say.

Q. Where did you see it?

A. At the plant.

Q. At a meeting?

A. At a meeting of the Supervisors and the plant manager.

Q. Is this return to work policy used as a basis for preparing this interpretation of seniority?

A. As it applied to that interpretation.

Q. And you say that only Mr. Burger and Mr. Bullock were [234] present when this document was drawn up?

A. That is right.

Q. Neither of those gentlemen participated in the writing of this so-called return to work policy?

A. They did not, no.

Q. Do you know how they got their information, so as to write this particular interpretation?

A. You mean is the interpretation complete?

Q. Yes.

A. We had several forms that we followed, and the agreement was between the Company and the Union.

Q. The agreement between the Company and the Union?

A. Yes, that was the basis for the balance of it, outside of the strike settlement.

Q. You, also, paid particular reference to seniority provisions as contained in the working agreement?

A. That is right.

(Testimony of Charles J. Cummerford.)

Q. In other words, it is your understanding that seniority is something that is arrived at in negotiations between the Union and the Company?

A. That is right.

Q. Now, regarding this so-called return to work policy, which is on the last page here, how many copies of those were in existence?

Mr. Elder: I object to the question. [235]

Q. (By Mr. Merrick): Well, I will rephrase it. Did you only have one copy in your personnel office?

A. I had one copy, yes. There is one copy supplied to each supervisor.

Q. Were those posted in the various departments?
A. They were not, no.

Q. Why not?
A. I don't know.

Q. Did the Company make known this policy to the employees through the supervisors?

A. Yes.

Q. In what manner was it made known to them?

A. By verbal, by talking to the employees themselves, if they were asked their standing in the department.

Q. But they were not shown the written agreement?

A. Not to my knowledge, they were not.

Q. Are they shown written agreements of these contracts?
A. Yes.

Q. The interpretations of 1947 and so forth? Are they shown written—in other words, in rela-

(Testimony of Charles J. Cummerford.)

tion to this contract, the employees have knowledge of all the amendments that have taken place in relation to this contract, is that correct?

A. Through the Union, yes. Those books are put out by the Union to their employees.

Mr. Elder: Let him answer the question, counsel.

Trial Examiner Leff: Had you finished with your answer?

Mr. Merrick: No, I am satisfied.

Q. They were never shown a written copy of this return to work policy, though?

A. Not to my knowledge, no.

Q. Would you have any reason why they would not be shown that? A. I have no reasons.

Q. Do you know who took part in the writing of this so-called return to work policy?

A. I do not.

Q. Do you know how it arose?

A. The meeting, you mean?

Q. Yes.

A. It was a meeting between the officials of the Union and our management to settle the strike.

Q. What Company officials took part in it?

A. I could not say, I could not answer that question.

Q. Well, to your knowledge, did any of the Company officials that took part in the writing of this return to work policy help in the framing of this interpretation of the seniority policy?

A. I do not believe they did.

(Testimony of Charles J. Cummerford.)

Q. In other words, you did that yourself, you and Mr. Burger and Mr. Bullock?

A. We drew the first draft. [237]

Q. How many other drafts were drawn up?

A. Just our draft, as far as I know, which we presented to the Manager of the Company.

Q. Yes, but you never got any instructions from anyone that took part in the negotiations with the Union?

A. No. I might enlarge on that; we were asked by the plant manager to draw up our interpretation of seniority as applied on the plant, and that draft was at that time drawn.

Q. Now, is it your understanding that the seniority, also, is arrived at through an interpretation of this particular agreement?

A. That is right.

Q. Don't you think the Union should have been called in, if you are going to revise the seniority provisions of the contract?

Mr. Elder: I object to the question.

Trial Examiner Leff: Sustained.

Q. (By Mr. Merrick): You say that Mr. Claude Walters was laid off because he did not have sufficient seniority, what do you mean by "sufficient seniority"?

A. His seniority was not, he did not have as much seniority as others in the department.

Q. You mean he didn't have any strike seniority?

A. What do you mean by "strike seniority"?

(Testimony of Charles J. Cummerford.)

Q. Just that? Super-seniority as a result of the strike? [238]

A. You mean the settlement of the strike?

Q. Yes, was that the basis of his lay-off?

A. Yes.

Q. Is that, also, true of Mr. Cloninger?

A. That is right.

Q. Now, you say that no grievance was filed regarding Mr. Walters?

A. There was no grievance filed with my office regarding Mr. Walters.

Q. Is it your impression that a grievance should have been filed?

Mr. Elder: We object to that. I don't think it makes any difference what his impression is.

Trial Examiner Leff: Sustained.

Q. (By Mr. Merrick): Well, you say no grievance was filed? A. No grievance.

Q. Why should a grievance have been filed?

Mr. Elder: We object to that as argumentative, and I don't think it's material.

Trial Examiner Leff: Sustained.

Q. (By Mr. Merrick): What was the purpose of the Union officials visiting you regarding Mr. Walters? You testified on direct that two Union officials came to see you regarding Mr. Walters' troubles?

A. Yes, but you asked me why Mr. Walters had not been put [239] on a job.

Q. Was that a presentation of a grievance?

(Testimony of Charles J. Cummerford.)

A. No, that is not. That is, it is the usual practice of the plant, the business agent or the representative of the Union have always made it a practice to call on the Personnel Director when anything is out of line. We usually discuss all those things and a possible settlement outside of a grievance. If a grievance is drawn, the Personnel Director immediately withdraws from the case and has nothing to do with it after that.

Q. You usually discuss that with the Union officials? A. That is right.

Q. And you did that for a period from, say, May 1st, 1948, to May 1st, 1949? A. Yes.

Q. Is that based on this contract?

A. We have continued to operate as we did previous to May 1st.

Q. To your knowledge is that contract still in effect? A. It is not in effect.

Q. When did it expire?

A. It expired the 1st of May, 1949.

Q. Up until that time it had been in effect, up until the 1st of May, 1949, it had been in effect?

A. Yes. [240]

Mr. Merrick: That is all.

Cross-Examination

By Mr. George:

Q. After going through that policy mimeographed, I couldn't find a situation where a man worked five years for the Company, got mad and

(Testimony of Charles J. Cummerford.)

quit and stayed away from the plant a year, and, then, returned. Would he start as a new employee, or would he pick up his old employment time to apply on his seniority?

A. Well, the minute that he quits, his seniority stops, and if he is hired back, his seniority starts as of the day that he is rehired.

Q. Now, supposing that he is transferred or accepts an offer of advancement that takes him out of the bargaining unit, and stays out of the bargaining unit for, say, a period of a year or two years, and, then, for some reason or other desires to return, does he pick up his seniority again, or does it keep on, right on adding up with the Company all the time?

A. You are speaking, now, of job, department, or plant?

Q. Yes. A. Which are you speaking of?

A. I am speaking of a man, for instance, you had uniformed guards out here during the War, didn't you?

Mr. Elder: I object on this line of questioning.

Trial Examiner Leff: Overruled. What the witness asked you is whether in referring to seniority you are referring to plant seniority or department seniority.

Q. (By Mr. George): Well, what difference would it make?

A. Well, it makes a lot of difference.

(Testimony of Charles J. Cummerford.)

Q. All right, tell me the difference?

A. A man can accumulate plant seniority regardless of where he is working. He still has plant seniority on any job on the plant. On department seniority he accumulates just the seniority that he can accumulate while he is in that department.

Q. Yes?

A. (Continuing): Job seniority is the seniority you accumulate while he is on the job in a department.

Q. But I am not making myself clear to you, I guess: You have lots of people working down at that plant that aren't covered by the contract, don't you? A. That is right.

Q. Now, what I want to know is whether or not the man that worked at a job that was covered by the contract and accumulated, say, five years of seniority, and, then, he takes one of these jobs that are not covered by contract and holds it for a period of, say, two years, has he, if he wants to come back into the plant again and take a job covered by the contract, does he start as a new employee, or does he pick up where he left off? [242]

A. No, he picks up where he left off.

Q. Is he able to add the period of time while he was doing this job that was not covered by the contract?

A. That is which department you are talking about, now?

Q. Well, I don't know what these jobs are that were outside the contract.

(Testimony of Charles J. Cummerford.)

A. Well, he comes back to the department in which he left.

Q. Yes.

A. He would pick up his seniority where he left off.

Q. He wouldn't be able to add, then, this period of time?

A. Also you must understand that by employees request and by Company convenience, if we take a man off the job at Company convenience, and ask him to go on the job, then, he maintains his seniority in that department for a reasonable length of time.

Q. And what is a reasonable length of time?

A. Well, that, of course, would depend a lot on the case. Company convenience would be merely to tide us over something in which it was necessary to put that man on an emergency, or possibly illness, or something of that nature. We would determine in a reasonable length of time, reasonable, I mean, perhaps, one or two weeks, whether or not that man is going to stay on that job or in that department.

Q. Well, the point that I am trying to get clear in my own mind is that you had armed guards here during the War, that [243] were deputized, packed a gun and everything else? A. Yes.

Q. They were declared to be outside the bargaining unit, and the Union didn't have any right to bargain for them, is that correct?

(Testimony of Charles J. Cummerford.)

A. That is right.

Q. Now, if a man, if he came back to the plant and took a job in the department, shows he had been shifted out of the department to get that job, would he retain his employment status?

A. Yes.

Q. Would he gain any seniority while he was working for the Company, but as an armed guard?

A. In the department, no.

Q. But in the plant?

A. In the plant, yes.

Q. In other words, the contract was made to extend even to people that were not covered by the contract?

A. As far as plant seniority is concerned; a case of that kind has never come up. I would say that he would maintain his plant seniority on any job on the plant.

Q. Regardless of whether it is covered by the contract or not?

A. That is right.

Trial Examiner Leff: Well, I am not clear on that; [244] suppose a man had been working on some job within the bargaining unit, then, he left that job and took a watchman's job or a plant guard job on which the Union—let me go back a moment. Suppose he had been working in a production department for five years, then, went into a watchman's job for a year, and, then, went back to the productions job, how many years' seniority would he have for the purposes of promotion or lay-

(Testimony of Charles J. Cummerford.)

off, as of the moment he went back to the production?

A. Did you say five years, and a year, six years of plant seniority, five years in his department?

Trial Examiner Leff: Yes.

A. And five years on the particular job, if it was a job, or the accumulated time on the job.

Trial Examiner Leff: Well, would he gain that extra year that he worked?

A. As plant seniority, yes.

Trial Examiner Leff: Now, let me take this situation: Supposing a man starts off in a watchman's job, or some other job outside the bargaining unit, he works in that job for five years, then, he is transferred to a production job and he works in that job for one year, and, then, there is a curtailment and a necessary lay-off, how many years' seniority would he be given credit for as of the time of the lay-off?

A. The case has never come up, but I would say that he would have plant seniority for a length of time. [245]

Trial Examiner Leff: Is that how you interpret the contract? Would you give him six years' seniority as of the time of the lay-off in that situation?

A. Pardon? I believe so.

Trial Examiner Leff: Do you think the Union would agree to that?

A. Well, I can't say for the Union. I imagine

(Testimony of Charles J. Cummerford.)

the Union would be agreeable all right to that.

Mr. George: You know the Union wouldn't, don't you?

Q. Now, did I understand you correctly that you formulated this paper called the "interpretation of seniority" at the order of one of your superiors?

A. We were asked to draw our interpretation of seniority as practiced at the Clearwater unit.

Q. And how long have you followed the policy of posting the seniority ratings out in the plant on what you call the Ouija board?

A. Well, the boards, as first drawn up, I think they were about, the first board, I believe, was about five years ago.

Q. About five years?

A. And the boards, I might explain why they are not being kept up, is because they were first drawn up, they were so bunglesome and hard to handle that we decided to change our system. Now, a system is being devised, a Kardex system, and they are being drawn up just as fast as they can be, and they [246] will be on display around the plant just the same as usual.

Q. Now, when did this change of policy take place, when did you decide to call this new policy?

A. It is not new policy. What do you mean?

Q. When you changed from this Ouija board system to this card index system that you explained?

A. Well, I guess we finally decided that the

(Testimony of Charles J. Cummerford.)

form as the boards were drawn up wouldn't keep them up. They were too hard to handle, I would say about six to nine months ago it was decided that they were. I instructed the training coordinator to provide other means of showing the seniority, job progression.

Q. Well, what I am trying to get at is this: Since you compiled this mimeographed copy on plant seniority, what have you done in the way of your Ouija boards to let the rank and file know that those Ouija boards no longer represent what the seniority system is in that department?

A. They have not been informed, generally, but any man who comes forward and asks his standing is shown it on the form on the foreman's book. You understand that we maintain foremens' books in the same form that the progression boards are, and any man can go in his office and look at the seniority as shown in the foreman's book.

Q. Well, were the boards taken up, or are they still up?

A. Some cases they were taken down, and some cases they are [247] still up. They should be taken down and the new boards put up.

Q. In these interpretations as you mimeographed them, there is no contention on your part, is there, that you ever discussed them with any Union committee?

A. No, they were not discussed with any Union committee.

(Testimony of Charles J. Cummerford.)

Q. I see. Now, in regard to Mr. Walters, at the time when the Union committee came to talk to you about that, it wasn't clear to me as to what you said the position the Union committee took?

A. They merely approached me to ask why Mr. Walters was not put on a job, and I explained to them why, and that was the end of it.

Q. I see. There was no commitment on their part as to what position they were taking one way or the other?

A. Mr. Gordon made the remark that he guessed that every effort had been made to give the old man a job, but did say that he was going to go back and interview him.

Q. Go back and interview him?

A. Walters.

Q. In other words, he didn't commit himself in any final way as to what Walters, I mean, the Union's situation as to Walters, would be?

A. I was given the impression that they were satisfied, because I didn't think any more about it, more than to give the old man a job. [248]

Q. What was said that gave you that impression?

A. I beg your pardon?

Q. What was said that gave you that impression?

A. The exact words, you mean?

Q. Well, substantially.

A. Well, after explaining it to them, I believe it was Mr. Gordon said that he guessed that the old man had sufficient offers of employment, and he would go back and talk to him and see if he would

(Testimony of Charles J. Cummerford.)

not take one of those jobs, that is what the inference was I drew.

Q. That was all that he said, though?

A. That is all, yes.

Mr. George: I believe that is all.

Redirect Examination

By Mr. Elder:

Q. After this meeting between Gordon and Angove representing the Union, as far as Walters and yourself were concerned, did you hear anything more from any of the Union representatives about Walters? A. No.

Q. And later Walters did take one of the jobs?

A. Yes.

Trial Examiner Leff: Which job did he take, one in his former department?

A. He took a job cleaning up cinders all along the loading [249] dock, his former department.

Trial Examiner Leff: Is that the job he had been working on?

A. Really, that is a plant job, cleaning cinders.

Q. (By Mr. Merrick): What was the answer?

A. Really that is a plant job, cleaning cinders.

Q. It wasn't in his old department?

A. No, it wasn't in the unstacker department.

Q. (By Mr. Elder): Now, the jobs that were offered Mr. Walters during the period of time that he was off the job, in your opinion was he capable of performing those jobs?

(Testimony of Charles J. Cummerford.)

A. Yes, I am quite sure he was.

Q. Did Mr. Walters apply for a lawn tending job?

A. Yes, he did. I understood that he had applied for that job.

Q. And in your opinion as Personnel Director, was he able to handle that job?

A. If he couldn't handle a watch job, he definitely couldn't handle a lawn job, but there was not a lawn job open. There is only one lawn tender, and that man has had a long period of time.

Q. You testified that Earl Bullock was present with you, and one of your committee that drew up Respondent's Exhibit No. 2. You testified that Bullock was now public relations man; you didn't testify as to what he was at that time that you drew this up. What was Mr. Bullock's capacity at that time? [250]

A. He was still Assistant Personnel Director at that time.

Q. Working for you?

A. Yes, my assistant.

Q. Was there a Mr. Turtleson in on this committee, too?

A. Yes, that is right.

Q. What capacity is Mr. Turtleson?

A. He is Assistant Training Coordinator.

Q. Was there a Mr. Shepherd on that committee?

A. I believe Johnny Shepherd was present at the meeting.

(Testimony of Charles J. Cummerford.)

Q. And what is his capacity?

A. He is Training Coordinator.

Q. Now, you stated that after you prepared the first draft of this, that you submitted it to management. What do you mean by "management"?

A. Well, in this case it was to the Unit manager, Mr. Troy.

Q. You have no knowledge as to whether Mr. Lauschel, the Assistant General Manager, went over it or not?

A. No, I have no knowledge.

Q. But he could have without your knowing it?

A. He could have, yes.

Q. Since October 13th, 1947, have you had other curtailments, other than the carpenter curtailment here, and the small curtailment in the unstacker department?

A. Oh, we have had several curtailments, of course, on the plant. I do not call to mind any curtailment where the [251] settlement of the strike was involved.

Q. Did you have a box factory curtailment?

A. Yes.

Q. When was that, approximately?

A. Oh, it must have been about, I should say, I believe about the 1st of December, to the best of my knowledge.

Q. What year?

A. 1948.

Q. Was this seniority policy as written up here followed in that curtailment?

A. Yes, it was.

(Testimony of Charles J. Cummerford.)

Q. Was it followed in all of your curtailments?

A. It was, yes, after it was drawn up, or after the interpretation.

Q. This policy has been in effect ever since October 13th, 1947? A. That is right.

Mr. Elder: You may inquire.

Recross-Examination

By Mr. Merrick:

Q. Mr. Cummerford, regarding this return to work policy which is attached to the last page here, did you know that that was purely a verbal agreement? A. I did not know.

Q. You had never believed that? [252]

A. No.

Q. Had you believed that it was a written agreement between you?

A. I had not been told anything insofar as the agreement had been reached, a settlement between the Company and the Union.

Q. Just what had you heard about that agreement? Had you heard anything about it from your superiors?

A. Well, that is rather a large question. It was discussed on numerous occasions, the strike settlement.

Q. Yes, and this particular part of it was discussed? A. The strike settlement?

Q. This return to work policy?

A. Yes, that was discussed.

Q. Have you ever seen a copy of the strike settlement agreement? A. The original copy?

(Testimony of Charles J. Cummerford.)

Q. Yes? A. No.

Q. Have you ever seen any copy of it?

A. Of the strike settlement? No.

Mr. Merrick: May I have Exhibit No. 5?

Q. (By Mr. Merrick): Have you ever seen this document before (hands paper to witness)?

A. No, I haven't.

Q. You don't know, then, that that is the strike settlement [253] agreement?

A. Well, shall I read it and determine?

Q. Yes, you may read it.

A. (Witness reads silently.) Yes, I believe that is my undersanding of it, and to the interpretation that is written there.

Q. In other words, it's your understanding that this particular return to work policy is a part of that agreement?

A. This return to work policy is part of that agreement?

Q. Yes?

A. That was my understanding, yes.

Q. But you did not know that this was an oral agreement? A. No, I didn't know.

Q. In other words, you understood this thing had been drawn up in written form at the time of the strike settlement, is that correct?

A. Yes, that is right.

Q. Now, you say it was about one year after the strike settlement that you finally drew this particular document up, this interpretation of seniority

(Testimony of Charles J. Cummerford.)

policy? Is there any particular incident that caused that to be drawn up?

A. Not that I know of, no except that we felt that we should have an interpretation of the seniority as practiced on the Clearwater project.

Trial Examiner Leff: When you drew up this seniority [254] interpretation that you said was drawn up in October, 1948, I believe you testified before that you referred to contracts between the Union and the Company?

A. Well, in drawing that up there is various interpretations of all seniority, and it was drawn up according to that agreement as far as that goes.

Trial Examiner Leff: Well, did you consult all agreements between the Union and the Company that had any bearing at all on the question of seniority?

A. No, I don't suppose that we did, no.

Trial Examiner Leff: Did you consult this document, General Counsel's Exhibit No. 5?

A. No, I haven't seen that.

Mr. Merrick: I have no more questions.

Mr. George: No questions.

Trial Examiner Leff: The witness is excused.

Mr. Elder: Wait a minute, if I may redirect him just a moment.

Q. (By Mr. Elder): In drawing up Respondent's Exhibit No. 2, which is the seniority policy, as far as the strike settlement agreement was concerned, did you use the exhibit which is attached to that policy, entitled "The return to work policy"?

(Testimony of Charles J. Cummerford.)

A. I did.

Q. Was it your understanding that that was a part of the strike settlement? [255] A. Yes.

Q. May I see that, Mr. Examiner? Referring to General Counsel's Exhibit No. 5, which is a proposed memorandum of the strike settlement that you have just read, does it refer to promotions, vacations, insofar as seniority is concerned (hands paper to witness)?

Mr. George: I will object upon the ground and for the reason that the document is the best evidence.

Trial Examiner Leff: Objection overruled, it's a preliminary question. I think we can agree that it does not.

Q. (By Mr. Elder): All right, where did you obtain the information that you put in this policy, seniority policy, as far as promotions are concerned, and as far as vacations are concerned, and as far as the return to work policy is concerned?

A. By the agreement, our agreement with the Union.

Trial Examiner Leff: What agreement?

A. Our working agreement, dated 1946.

Q. (By Mr. Elder): And where did you obtain the policy as far as the return to work policy is concerned?

A. From this interpretation in this form.

Q. And when did you obtain that?

A. The 13th of October, 1947.

(Testimony of Charles J. Cummerford.)

Mr. Elder: That is all.

Mr. George: No questions. [256]

Trial Examiner Leff: Oh, just one question: Is this the first time that you have seen this Exhibit 5?

A. Yes.

Trial Examiner Leff: The first time is today?

A. Yes.

(Witness excused.)

Mr. Elder: Mr. Dave Troy.

DAVID S. TROY

called and sworn as a witness on behalf of the Respondent, testified as follows:

Direct Examination

Trial Examiner Leff: What is your full name?

A. David S. Troy.

Trial Examiner Leff: (Spells) T-r-o-y?

A. (Spelling): T-r-o-y.

Trial Examiner Leff: Where do you live, Mr. Troy? A. 1224-3d Street.

Q. (By Mr. Elder): What position do you hold in Potlatch Forests, Inc., Mr. Troy?

A. Manager of the Clearwater Unit.

Q. And what are your duties as manager of the Clearwater Unit of Potlatch Forests, Inc.?

A. Well, I am in charge of the supervisory staff at Clearwater mill.

Q. You are the manager of the entire operation?

A. That is right.

(Testimony of David S. Troy.)

Q. Speak up, so that the reporter can hear you. As Manager of the Clearwater plant of the Potlatch Forests, Inc., are you acquainted with the seniority policy of the Company? A. I am.

Q. I hand you Respondent's Exhibit 2, which has been identified as the seniority interpretations in operation prepared by Mr. Cummerford in his capacity as Personnel Director and a committee of the employees working in his department, and ask you if that sets forth the seniority policy as far as the Potlatch Forests, Inc., is concerned (hands paper to witness)? A. It does.

Q. I call your attention to the return to work policy which is on the last page of Respondent's Exhibit 2, and ask you when you were first advised of that policy?

A. About five minutes after the agreement was signed.

Trial Examiner Leff: What agreement?

A. The strike settlement agreement.

Trial Examiner Leff: Was signed?

A. Was signed.

Trial Examiner Leff: Was signed by whom?

A. I believe Mr. Botkin and Mr. Billings.

Trial Examiner Leff: Is this the agreement that you have reference to, General Counsel's Exhibit No. 5?

A. Yes, that is right. [258]

Q. (By Mr. Elder): Were you present at the negotiations settling the strike?

A. I was not.

(Testimony of David S. Troy.)

Q. But after that settlement you were advised of this return to work policy?

A. I was advised of the settlement, and the return to work policy was, if I remember correctly, written immediately, so we would have something to go by, uniformly speaking, at the plant.

Q. You heard Mr. Cummerford's testimony as to a meeting that was held at the plant on the morning of October 13th, 1947?

A. I called that meeting.

Q. And at that meeting did you present to the supervisors and inform them of the copy of this return to work policy?

A. I did, and it was, also, discussed.

Q. Where did you obtain the information as to what the strike settlement agreement was?

A. Mostly from the signed settlement. That was discussed.

Q. Did you discuss the matter with Mr. Lauschel and Mr. Billings?

A. I did.

Q. And who determined this return to work policy as far as Potlatch Forests was concerned?

A. I think it was determined by a group made up of management. [259]

Q. Who would that group be?

A. Mr. Billings, Mr. Lauschel, and Mr. Reddick and Mr. Huffman, and I was there, and Mr. Beardmore was there.

Q. And on October 13th, 1947, you were advised by them that this was the return to work policy?

A. That is right.

(Testimony of David S. Troy.)

Q. When did this meeting take place?

A. On October 13th, 1947, I believe, in the morning. You mean, the meeting with the supervisors?

Q. Yes. Tell me this, Mr. Troy, what is the difference as far as the operation of the seniority policy in the Clearwater plant is concerned, between the time prior to the strike and the present time?

A. Well, there is no difference excepting the men that came back to work were not to be replaced by those that came back after October 13th.

Q. And why is that policy now in effect?

A. Why?

Q. Yes.

A. Because of the strike settlement.

Trial Examiner Leff: When you refer to the strike settlement, what do you refer to?

A. This (indicating).

Trial Examiner Leff: General Counsel's Exhibit No. 5, is that right? [260]

A. Yes.

Trial Examiner Leff: You are pointing to General Counsel's Exhibit No. 5.

A. That is right.

Q. (By Mr. Elder): As far as promotions on the plant are concerned as to the present time, are they handled in the same manner as they were prior to the strike? A. They are.

Q. In referring specifically to that memorandum, there is no mention in there as to promotions, is there? A. In this?

Q. Yes.

(Testimony of David S. Troy.)

Trial Examiner Leff: General Counsel's Exhibit No. 5.

Q. (By Mr. Elder): Yes.

A. (Witness reads silently.) No.

Q. So, actually, how did you arrive at this return to work policy?

A. Well, that was, undoubtedly, agreed upon verbally. The strike settlement, because that was very definitely part of the strike settlement when the return to work policy was written.

Q. And who advised you of that on this October 13th, 1947?

A. The same group that met immediately after the agreement was signed. [261]

* * *

Mr. Elder: This witness was not present as he has testified, at the time the strike settlement agreement was arrived at, therefore, he cannot testify as to what the strike settlement agreement contained. The purpose of the questions [262] was to find out from this witness where he received the return to work policy. In other words, he is a plant manager here operating under a seniority policy. In other words, where did he receive the instructions as to that policy, that is what we were trying to bring out. If Counsel here wants to stipulate that we have been following this policy as set out in Respondent's Exhibit 2 since October 13th, 1947, we will so stipulate, and these witnesses will not be necessary.

(Testimony of David S. Troy.)

Trial Examiner Leff: Now, just so that we will be clear, when you refer to the policy, are you talking about this entire document, or are you talking about the return to work policy?

Mr. Elder: The return to work policy is what we are talking about, that is the issue here.

Trial Examiner Leff: Will you so stipulate?

Mr. George: The stipulation as worded is a little misleading. It appears to me if they would change it slightly, we probably would stipulate. What the Company secretly had in the back of their mind, we don't know. All we want to know is whether they had knowledge of it.

Trial Examiner Leff: Now, all we want as a stipulation from you is, since October 13th the Company has been following the return to work policy which is set out in this document, Respondent's Exhibit 2.

Mr. Merrick: I don't think I can stipulate on that, [263] because I don't have knowledge. I would stipulate as to Cloninger and Walters.

Trial Examiner Leff: It seems to me that that is precisely what the General Counsel alleges in his complaint. I think if Respondent is willing to stipulate, I don't see why you should have any hesitancy.

Mr. Merrick: The material allegations as to Cloninger and Walters is what I am primarily interested in, anyway. I will stipulate it.

Mr. George: Yes, I think I can stipulate that.

(Testimony of David S. Troy.)

Trial Examiner Leff: The stipulation is approved. Perhaps, we can save some time.

* * *

Trial Examiner Leff: While Counsel is looking for that Exhibit, I should like to ask you this question: Referring to General Counsel's Exhibit No. 5, which I hold in my hand, have you ever seen this, or a duplicate of this, before this hearing (hands paper to witness)?

A. Yes.

Trial Examiner Leff: When did you first see it?

A. I saw the original immediately after it was signed. [264]

Trial Examiner Leff: Under what circumstances did you come to see it?

A. The strike was over.

Trial Examiner Leff: Yes, now, who showed it to you?

A. Mr. Billings, the General Manager.

Trial Examiner Leff: And what did he say at the time he showed it to you?

A. We all read it, and he told us the strike had been settled.

Trial Examiner Leff: Was this on October 12th or October 13th?

A. I don't recall. It seems to me it was the 12th, maybe I am wrong.

Q. (By Mr. Merrick): Was it Sunday night, do you recall? Was the plant working on that day?

A. No. If it actually was on Sunday, I imagine, it was the 13th I first saw it.

(Testimony of David S. Troy.)

Trial Examiner Leff: Did he show you any other document at the time he showed you this?

A. No.

Trial Examiner Leff: Now, was this the only document that he referred to when he referred to the fact that the strike had been settled?

A. That is right.

Trial Examiner Leff: I am referring, now, to General [265] Counsel's Exhibit No. 5?

A. Yes.

Q. (By Mr. Elder): Did he at that time tell you how promotions were to be handled after the strike settlement? A. He did.

Q. And what was that?

A. The employees returning to work after the strike would not be affected in any way in regard to promotions, that is, they would accept the promotions as they developed any advance in work.

Q. What else did he tell you?

A. That the employees who had been working would not be replaced by the returning workers after October 13th.

Q. I hand you General Counsel's Exhibit No. 11 and ask you to examine it, and ask you further if the signature appearing on the second page is your signature (hands paper to witness)?

A. Yes, it is.

Mr. Elder: You may inquire.

(Testimony of David S. Troy.)

Cross-Examination

By Mr. Merrick:

Q. Mr. Troy, how long have you worked at the Clearwater plant? A. Twenty-two years.

Q. How long have you been manager? [266]

A. Oh, I think five years.

Q. Have you taken part in contract negotiations and other labor relations? A. I have.

Q. Do you take part in the interpretations of the '46 contract? A. Yes (nods).

Q. Do you recall if you took part in the negotiations in the Spring of '47 and the Spring of '48?

A. I think I sat in on all those meetings.

Q. Did you take part in the negotiations this year, the ones that were done? A. Yes.

Q. Now, you stated that you first saw the strike settlement, agreement which is General Counsel's Exhibit No. 5, on the night after the strike was settled, or the night of the strike settlement?

A. I don't remember what it was, but it struck me it was in the morning, and it was the same day it was settled that I saw it, I am sure.

Q. And regarding the return to work policy, can you tell me when you first saw that?

A. As I remember it, that was an outcome of a meeting of this group that I mentioned in Mr. Billings' office shortly after the strike was settled.

Q. And was it your impression that that return to work policy was prepared by the company?

A. Yes.

(Testimony of David S. Troy.)

Q. Were the Union officials still present in the building when that was prepared?

A. They were not.

Q. To your knowledge, was a copy of that ever sent to the Union? A. I don't know.

Q. Do you think it was?

A. I don't believe so.

Q. As a matter of policy, do you think it should have been?

Mr. Elder: I object to that.

Trial Examiner Leff: Sustained.

Q. (By Mr. Merrick): Now, the seniority policy that was followed by the Company regarding promotions, what is the source of that seniority policy?

A. Well, that came out of the strike settlement.

Q. Well, doesn't that, I thought that was not covered in the strike settlement?

A. Undoubtedly it was covered some way or other, because it was very definitely fresh in the minds of our people, anyway, that made the strike settlement, or were there when the strike settlement was made.

Q. It was your impression, though, that it comes out of the [268] strike settlement agreement and not out of the prior bargaining contract in effect between the Union and the Company?

A. Well, that wasn't changed insofar as the contract was concerned.

Q. That particular aspect of the contract was

(Testimony of David S. Troy.)

not changed by the strike settlement? In other words, then, it arises from this contract?

A. Originally.

Q. You stated that it was your impression that the return to work policy was drawn up because you wanted to have something to go by? In other words, is it your policy to put into writing all of these various transactions?

A. I wanted all of our foremen to know exactly what was covered in the strike settlement.

Q. Now, you had knowledge of the return to work policy right after the strike settlement, is that correct?

A. Very shortly after.

Q. Why was there a wait of one year before the interpretation of the seniority clause was drawn up?

A. I think I can explain that. I talked to Mr. Lauschel about our seniority policy, and thought that it might be a good idea to have our seniority policy the same in all of the units, that is, at Potlatch and Coeur d'Alene and Lewiston, so that we were all doing the same thing, and to start that I asked Mr. Cummerford if he would take his committee or boys [269] that were in his department, and draw the first draft of what we had been doing for years, not just since this strike, but what we had been doing for a considerable length of time, and Mr. Cummerford did that and submitted it to me, and, in turn, we had a meeting of the present plant management, managers and Mr. Beardmore, and we made very few changes. In

(Testimony of David S. Troy.)

fact, I don't remember what changes were made, it was changed but very little, and the whole reason behind it was to have a uniform working policy.

Q. In other words, you worked out the finished copy of the draft?

A. The plant managers did that.

Q. Did you send a copy to the Union?

A. I did not.

Q. Who was the Mr. Huffman that you referred to that took part in some of these meetings?

A. Mr. Huffman is assistant general manager of Potlatch Forests.

Q. I would like to call your attention to General Counsel's Exhibit No. 11, do you recall what Mr. Gordon's attitude was regarding the settlement which was worked out under Step No. 4? Is this your writing here, this word "over"?

A. Yes.

Q. What was Mr. Gordon's attitude regarding that grievance (hands paper to witness)? Well, first, maybe I had better [270] rephrase it: Was it your impression that he did not accept the Company's interpretation of the seniority policy?

A. No, he did not.

Q. He did not accept it?

A. He did not accept it.

Mr. Merrick: That is all. Your witness.

(Testimony of David S. Troy.)

Cross-Examination

By Mr. George:

Q. How long did you say you have been with the Company in connection with their labor relations?

A. Well, I haven't been connected with their labor relations since I have been with the Company, but I have been with the Company twenty-two years.

Q. And how long have you been dealing with the C.I.O.?

A. I didn't hear you?

Q. How long have you been dealing with the C.I.O.?

A. Ever since they became the bargaining agent.

Q. And you were familiar with the policy that the committee from the Union that meets with you always has, to take it back and have it ratified by the rank and file before it means anything?

A. That is right.

Q. Now, in this strike negotiations, what was said to you when they came out and told you the strike was settled, about the arrangement to have the referendum taken of the rank and file of the Union? [271]

A. It had to be taken back and ratified by all the Locals. If I remember rightly, it was going to take a few days' time or a day or two's time.

Q. I see. And the document that they were to take back was this document that is General Counsel's Exhibit 5?

A. Yes.

(Testimony of David S. Troy.)

Q. I see. And was it to be any other document they were to take back and vote on?

A. I don't think so.

Q. I believe I understood you to say that this back to work policy was never tendered or given to the Union at all?

A. No, we were led to believe that the Union was going to sell the settlement to their own Locals.

Q. Well, was it your understanding that this General Counsel's Exhibit 5 contained everything that there was in the strike settlement?

A. I don't believe so. I think promotions isn't mentioned here. That was definitely part of it. I think there were some things in the strike settlement that were agreed to verbally, that were, perhaps, not written or included in this document.

Q. Was there any intent there to try and fool the rank and file as to what the strike settlement was?

A. It appeared that way.

Q. Who was going to do the fooling? [272]

A. I imagine the people that signed the Union plan, that initialed the strike settlement.

Q. Well, there isn't any way the rank and file would have known, then, what the strike policy was, is there?

A. I wouldn't know.

Q. You have a pretty thorough personnel system, don't you?

A. Yes. I didn't think it was our responsibility to notify the rank and file of what we thought the strike settlement was. It was agreed upon between the parties concerned.

(Testimony of David S. Troy.)

Q. Do you know from your information that comes across your desk every day, and following the time of the strike, as to whether or not the men ever did vote on this back to work policy?

A. No.

Q. Do you know that they did not?

A. I don't know.

Q. Who was the man that advised you of what this strike settlement was?

A. Mr. C. L. Billings and Mr. Otto Lauschel, both of them.

Q. Both of them together?

A. I think they were both there, yes.

Q. Since you have been dealing with the Union, has it not been your policy that when there were any changes to be made in the contract, that they had to be reduced to writing? A. Yes. [273]

Q. And if there was a change, it had to be referred to the rank and file to be ratified?

A. I have been under that impression, yes.

Q. I see. And you expected that that same procedure would be used in the strike settlement?

A. Well, I really didn't give it any thought, but I imagined that it would be.

Q. Do you know of any instance where there ever has been a change in the contract that hasn't followed that same procedure, that is, reduced to writing and referred back to the rank and file?

A. Not definitely, no.

Q. Now, with regard to your document which

(Testimony of David S. Troy.)

you had drawn up to inform your superintendents as to your seniority policy: Was that ever referred to the Union?

A. Not to my knowledge, no.

Q. Did that appreciably change the existing contract?

A. It did not, the only change was on the strike settlement.

Q. Well, there was a change, then?

A. This knowledge that these boys got together in this seniority document was made up over a long period of years. It wasn't just since the strike. It was an accumulation of how we had handled seniority since 'way back.

Q. Yes, but that document only expresses your idea of what [274] it is, it isn't an idea that was arrived at jointly with the Union?

A. But it was primarily written to conform with the regulation agreement.

Trial Examiner Leff: What agreement?

A. The 1946 agreement.

Q. (By Mr. George): And that was the agreement that was in force up until just this last May?

A. Well, there were some changes in it, I believe, made a year ago, but it was the original agreement.

Q. I notice that this document which we call the strike settlement document, makes reference to a contract, it says, Section 5 reads, follow it with me: (Reading) "The present contract will remain

(Testimony of David S. Troy.)

in effect without change except if the following is substituted and pertains to the Union maintenance clause," what contract was that talking about? What contract was in effect?

A. It is talking about the 1946 contract.

Q. With its amendments? A. Yes. [275]

* * *

OTTO H. LAUSCHEL

called and sworn as a witness on behalf of the Respondent, testified as follows:

Direct Examination

Trial Examiner Leff: What is your full name?

A. Otto H. Lauschel.

Trial Examiner Leff: Your address?

A. 600 Third Avenue.

Q. (By Mr. Elder): What position do you hold with the Potlatch Forests, Inc., Mr. Lauschel?

A. At this time?

Q. Yes? A. Acting General Manager.

Q. And what position did you hold in October, or during the year 1947?

A. I was Assistant General Manager.

Q. As Assistant General Manager of the Potlatch Forests, [276] Inc., did you sit in on the settlement of the strike that occurred on August 7th, 1947? A. I did.

Q. When was the first time you were approached

(Testimony of Otto H. Lauschel.)

by the Union as to negotiations for the settlement?

A. I believe it was about October 3d, at least the latter part of that week.

Q. Who was the first person that contacted you?

A. Mr. Fadney.

Q. Mr. Fadney? A. And Mr. Burkes, yes.

Q. And what resulted from that contact?

A. Nothing, no settlement.

Q. And when did you next hear from the Union regarding the settlement? Or from any one?

A. I think it was the following Monday, I was out of town in the morning, when I was in Spokane, and returned in the afternoon, and Mr. Billings told me that Mr. A. L. Roth of the Weyerhaeuser Timber Company had called him and said that he had been contacted by George Brown and Al Hartung, and they had told Mr. Roth that they realized that there was no direct connection between the timber company and Potlatch Forests, but asked if he would intercede with Mr. Billings and arrange for a meeting with him for Mr. Brown and Mr. Hartung. [277]

Q. And did a meeting result from that?

A. It did, on the 7th.

Q. That meeting was on the 7th of October, 1947? A. That is right.

Q. And who attended that meeting?

A. Mr. Billings and myself and George Brown and Mr. Hartung.

Q. And where was that meeting?

(Testimony of Otto H. Lauschel.)

A. In Mr. Billings' office.

Q. And where is that?

A. In the Brier Building.

Q. Lewiston?

Trial Examiner Leff: May we have these people identified? Who is Mr. Billings?

A. Mr. Billings at that time was Vice President and General Manager of the Company.

Trial Examiner Leff: And who is Mr. Brown?

A. Mr. Brown is a C.I.O. representative, I believe, Western representative, wasn't he, Al?

Mr. Hartung: Director of Organizations of I.W.A.

Trial Examiner Leff: Mr. Hartung?

A. Mr. Hartung was organizing representative for the C.I.O.

Trial Examiner Leff: Thank you.

A. (Continuing): They explained to us at that time that they were not officers of the I.W.A., but were in a position of high advisory capacity. [278]

Q. (By Mr. Elder): And what took place at that meeting on the 7th?

A. Well, they told us that they felt that the strike was in a bad way, that some settlement should be made, and felt that they wanted to find out how we felt about points of settlement, and what would be done, what could be done to settle the strike.

Q. And what was discussed and what was settled? A. Well, the differential, for one.

(Testimony of Otto H. Lauschel.)

Q. What was the decision on the differential?

A. We advised them that under no circumstances would we damage the present differential.

Q. And what else was decided at that meeting?

A. Another point that came up was the matter of the maintenance of membership clause in the contract, which we said would not be tolerable after the strike was settled.

Q. And what else?

A. Well, the matter of taking care of the men who had come back prior to the end of the strike.

Q. And what was decided at that meeting on that question?

A. We told them it was our firm opinion that we would not under any circumstances allow any of those men to be replaced.

Q. By the men coming back?

A. By the men coming back to work after the strike.

Q. All right, was there an agreement finally reached at [279] that meeting? A. No.

Q. And when was the next meeting after the 7th?

A. I would like to go on on another point of discussion at that particular meeting, to bring Mr. Hartung and Mr. Brown up to date. We told them that on that morning we had had something like 1750 men at work, and we enumerated just about how they were, where they were working, and they said that that agreed to the latest figures they had.

(Testimony of Otto H. Lauschel.)

Trial Examiner Leff: How many men did you have at work just before the strike began?

A. About 2600.

Q. (By Mr. Elder): Anything else at that meeting on the 7th of October?

A. Well, we discussed local unions to some extent, but it was a very, very pleasant and fine meeting. We felt that we had probably had contact with the best men we had met yet, met up to that time, and when they left they said they had to go to Portland that night, and were scheduled, I believe, to leave on the next day or very shortly, for the big meetings back in Detroit and Boston, and they said they would go down to Portland that night and tell the Union down there about their matter, or talk with us, and that we would hear from them very shortly.

Q. All right, and did you hear from them? [280]

A. We did.

Q. When was that?

A. Well, I think probably the 8th. In any event, we had a meeting on the 9th.

Q. Of October?

A. Of October, with Mr. Botkin and Mr. Eggers.

Q. And who else was present at that meeting?

A. Mr. Billings and myself.

Trial Examiner Leff: If you will identify Botkin and Eggers?

Q. (By Mr. Elder): And where was the meeting held?

A. In Mr. Billings' office.

(Testimony of Otto H. Lauschel.)

Q. Who was Botkin and Eggers?

A. I don't know their official positions. Mr. Botkin was with the I.W.A., C.I.O.

Mr. Elder: Could we stipulate what their positions were?

Mr. Hartung: Mr. Botkin was the first vice president at that time. Mr. Eggers was a member of the Northwest Regional negotiating committee for the C.I.O. for the I.W.A.

Q. (By Mr. Elder): And what was discussed at that meeting, Mr. Lauschel?

A. Just about the same things that were discussed with Mr. Hartung and Mr. Brown.

Q. And was any agreement reached at that meeting? [281] A. No.

Q. And what happened to terminate that meeting? What was it?

A. Well, we finally drew up a tentative set-up of points that we wanted covered in any settlement of the strike, and we wrote those jointly between the four of us, and they took these recommendations and said they wanted to talk to their group, and we would hear from them later.

Q. All right, and, then, when did you hear from them next? That meeting was on the 9th?

A. That was in the morning.

Q. Yes?

A. Then, in the afternoon they called again for another meeting, and brought a typewritten paper in to us.

(Testimony of Otto H. Lauschel.)

Q. Just a moment, who was at this afternoon meeting? Tell who was there and who was with you?

A. The same four.

Q. The same four in the same place?

A. Yes.

Q. They brought you in what?

A. They brought in this set of points that we had drawn up, substantially as we had it, as I recall it, except, could I see that exhibit, the strike settlement?

Q. It must be this (hands paper to witness).

A. (Continuing): Except for this No. 2, which says, [282] "All former employees of Potlatch Forests, Inc., will return to work without discrimination," and they had in there, "or loss of seniority," and we told them that the thing was all right except for that, and we would not agree to that wording in there.

Q. Now, why wouldn't you agree to that?

A. Because it would establish the full seniority without the provision to protect the men who had come back on the job.

Q. And had they agreed?

Trial Examiner Leff: Is that what you told them?

A. Yes.

Q. (By Mr. Elder): And they had agreed to that?

A. No, they didn't agree to it, but they finally, they said, "Well, can we be excused," and they went out in the hall there at the office and came

(Testimony of Otto H. Lauschel.)

back in a few minutes with that stricken out.

Q. And what agreement as far as seniority did they agree to, Mr. Lauschel?

A. Well, in the first place, when they came back with that stricken out, we asked them why they didn't want to mention seniority.

Q. They told us that they thought it would be difficult enough to sell their membership on a settlement which didn't entail some gain in the way of the differential, without any mention of seniority. It was just further complicating their [283] sales job.

Q. Now, that meeting was in the afternoon of October 13th? A. 10th, I believe.

Q. 10th? And when was your next meeting?

A. Well, they were to take that agreement, then, in that form to their Locals, and said they would have to hurry to get it all approved before the back to work on Monday the 13th, and the next we heard from them was Sunday evening, I believe, it was late in the afternoon or Sunday evening.

Q. And who was at that meeting?

A. Mr. Botkin and Mr. Billings and myself.

Q. Mr. Eggers was not present at that meeting?

A. That is right.

Q. And was that the final meeting of your negotiations? A. Yes.

Q. As far as seniority is concerned, Mr. Lauschel, what was the agreement on the strike settlement?

(Testimony of Otto H. Lauschel.)

Trial Examiner Leff: What was said?

Q. (By Mr. Elder): That is right?

A. On the what?

Q. As to the seniority of the employees, what was said at this meeting as far as that?

A. We didn't feel, any of us, that their seniority would be affected in any way except in the way of a curtailment.

Q. And what would happen in the way of a curtailment? [284]

Mr. Merrick: Could I interrupt? Are you referring to the October 12th meeting, now?

A. No.

Trial Examiner Leff: What meeting are you referring to?

A. The 10th.

Trial Examiner Leff: Well, instead of saying how you feel, we have to get the evidence in legal form. I would like to know exactly what was said on the subject. Please let us know who said what, and exactly what was said.

A. Mr. Billings and I, I just don't know who said what. When I say "we" I mean either he or I.

Trial Examiner Leff: That is good enough.

A. (Continuing): And when I say "the Union" I don't know which one, whether Mr. Eggers or Mr. Botkin.

Trial Examiner Leff: Let's have the conversation on that point, that is, Mr. Billings or you, and what the Union representatives said on that point?

A. On which point?

(Testimony of Otto H. Lauschel.)

Trial Examiner Leff: On the point of seniority, just the substance, as nearly as you can remember.

A. Well, there was quite an awful lot of conversation about that particular point, and they objected to it. And, finally, when the Union said that they didn't feel that any mention of seniority should be put in writing in the memoranda of agreement, Billings said, "Well, maybe that is all right, [285] too," and there wouldn't be any effect of it felt until there was some serious curtailment, and nothing like that was in prospect.

Q. (By Mr. Elder): What was said to the Union at this meeting on October 10th as to the position of the Company as to seniority and the strike settlement agreement?

A. Well, the position of the Company would be that we agreed all through the thing that there be various things that would have to be straightened out, such as the vacation clause, because any men that had been off for two months under the vacation clause as it was then written in the contract, would not be eligible for vacation, and we agreed that we would re-write that so that for vacation purposes all men returning would retain their seniority also, that all men would retain their seniority for promotion, and if their jobs were occupied before they came back, they would be put into other jobs on that and paid at the rate which they had been paid when they went on strike.

Q. Now, about the replacement of employees that were working at that time?

(Testimony of Otto H. Lauschel.)

A. No employee would be replaced by any man returning after October 13th.

Mr. Merrick: Can I interrupt here: Is it his testimony that the Union agreed to that?

Mr. Elder: It will be. [286]

Mr. Merrick: We haven't got to your agreement yet.

Mr. George: One further point: The time and place where this last conversation took place?

Q. (By Mr. Elder): He was talking about the 10th of October, is that correct?

A. Yes, the 10th.

Mr. Merrick: The next to the last one.

A. Of course, that same conversation was made, Mr. Brown, in all the conversations we had, it all revolved around those points.

Q. (By Mr. Elder): Was that matter discussed in your meetings of October 12th?

A. Yes. [287]

* * *

Q. (By Mr. Elder): You have, just before the discussion here, repeated the several propositions which were presented to the Union by you and Mr. Billings at this meeting. My question was whether or not the Union, at the meeting on October 10th, and at the meeting on October 12th, agreed to that?

A. Well, I can't say that they agreed to it. We took it that they agreed to it when they took his paper and said that [291] they were going to present that to their Locals. That is the only assumption we could make.

(Testimony of Otto H. Lauschel.)

Q. Didn't they——

Trial Examiner Leff (Interposing): Pardon me, a moment, when you refer to this paper, so that the record will be clear, are you referring to General Counsel's Exhibit No. 5?

A. That is right.

Q. (By Mr. Elder): Were there, Mr. Lauschel, other agreements besides those contained in General Counsel's Exhibit No. 5, as far as the strike settlement is concerned?

A. The agreement was on the seniority clause, the lack of understanding with them was that this return to work would not jeopardize the jobs of men who had come back from the strike.

Q. Did they tell you at that meeting that they agreed to that? A. Yes.

Mr. Elder: You may inquire.

Mr. George: I move at this time that the testimony of the witness be stricken.

Mr. Merrick: I also join in that motion. The testimony relative to the alleged oral contract.

* * *

Trial Examiner Leff: I will let the witness' testimony stand. Proceed with your cross-examination.

Cross-Examination

By Mr. Merrick:

Q. Is that pronounced Mr. Lauschel?

A. Lauschel, yes.

(Testimony of Otto H. Lauschel.)

Q. Mr. Lauschel, when was the approximate date of your first approach by Mr. Fadling?

A. Why, I think it's about October 3d, as I recall it. It was some time in the week prior to Mr. Brown and Mr. Hartung's visit.

Q. Did Mr. Fadling come and see you personally?

A. Mr. Fadling and Mr. Burkes, yes.

Q. What did Mr. Fadling have to say about the strike? What was his attitude regarding the strike? In other words, [295] did he admit that the Union had lost the strike? Was that the basis that he approached you on?

A. No, I don't believe he did, but he said it was dragging along, and he wanted to know what kind of a settlement could be made on it, and if we were willing to concede any part of the differential.

Q. Well, to put it another way: Would you say at that time that the Company was in a position where the Union had to come to them?

A. That is right.

Q. That means, they were not in a good bargaining position?

A. That is right.

Q. Most of the men had returned to work, and things were not going too well for the Union?

A. That is right.

Q. Now, you said that Mr. Eggers and Mr. Botkin approached you after you had had your interview with Mr. Hartung and Mr. Brown?

A. That is right.

Q. Generally, what was the situation after Mr.

(Testimony of Otto H. Lauschel.)

Hartung had left town, regarding this settlement agreement? In what status was it when they had left, had the details been agreed upon?

A. No, they didn't agree to anything, they merely listened to us, and we talked the whole situation over, the strike [296] situation, and return to work movement.

Q. Did they say why they wanted to call in Mr. Eggers and Mr. Botkin?

A. They didn't say who they wanted to call, they just simply said that they were making this inquiry to see if some basis for settlement couldn't be arrived at.

Q. They were anxious to settle? A. Yes.

Q. Now, in the two meetings that you had on the 10th and on the 12th—

A. (Interposing): I think there was one on the 9th, too.

Q. Well, the 10th and the 12th were when Botkin was there?

A. On the 9th, weren't they here on the 9th, too?

Q. No.

A. We had a preliminary meeting on the 9th at which we discussed the various points that we insisted be included in the settlement.

Q. Well, when was the first meeting where you maintained there was more or less an agreement what the seniority policy was to be, was that the meeting on the 10th, the afternoon of the 10th?

(Testimony of Otto H. Lauschel.)

A. Yes.

Q. And the conversation on the 10th and 12th was more or less the same, then, is that correct, regarding the two meetings? [297]

A. Well, on the 12th there wasn't a great deal of conversation. Mr. Botkin, as I recall, was alone, and Mr. Billings and myself. Mr. Billings called me at the home.

Q. What I want to point out, you maintain then, that the last meeting Mr. Eggers attended you had more or less agreed upon this seniority?

A. That is right.

Q. And your final meeting more or less went over the same material that had been covered when Mr. Eggers had been there?

A. The final meeting was.

Q. You say Botkin was there alone?

A. Botkin was alone.

Q. But on the meeting that Mr. Eggers had been there, the preceding meeting, the same points had been agreed upon? A. Yes.

Q. There wasn't any real, material difference between the two meetings?

A. The 10th and the 12th?

Q. Yes.

A. The 12th was more or less a meeting to bring this thing into a close. We had to assume that they had taken this up with their membership, their Locals, and brought it in for final settlement.

Trial Examiner Leff: Excuse me a moment, when was this thing initialed? [298]

(Testimony of Otto H. Lauschel.)

A. Sunday evening.

Trial Examiner Leff: October 12th? Was that after it was submitted to the membership?

A. We don't know whether it was submitted, but we understood that it had been.

Q. (By Mr. Merrick): Now, Mr. Lauschel, on direct examination, you say that you had assumed that the Union officials had agreed to this seniority clause; just what did they say that led you to believe that they had assumed this contract? You say that you assumed that they had agreed to it, did they come right out and say that they had agreed to it?

A. I don't believe that they ever did.

Q. At any time did they say that they had agreed to this seniority provision?

A. They agreed to the return to work rules that we had laid down.

Q. But did they specifically agree to follow the policy of strike seniority for men who came back prior to the end of the strike? Did they specifically agree on that?

A. We had to assume that they did when they took out that "without loss of seniority" wording out of that settlement.

Q. In other words, when they struck that particular clause out of that contract, you took that act for their assumption of agreement?

A. Yes. [299]

Q. They never said that they agreed specifically?

(Testimony of Otto H. Lauschel.)

A. We didn't ask them to when they took that out, and we asked them why, and they said that they felt it better not to put in wording in there about seniority.

Q. Now, Mr. Lauschel, I think you testified that the Union at the time was in a bad position, they came to you looking for a settlement. Do you think it's reasonable that you would allow them to do something like that where you could make them put it in writing?

Mr. Elder: I object to the question.

Mr. Merrick: I will withdraw it. That is all I have.

Cross-Examination

By Mr. George:

Q. It isn't clear to me yet, the sequence of events, Mr. Lauschel; when was this matter submitted to the rank and file with reference to the time when you and Botkin and Eggers drew up these five points? Was it before the document was initialed by you, or was it after?

A. It was after.

Q. After you initialed it?

A. What do you mean? State your question again.

Q. I am asking at what time were these five points to be submitted to the rank and file to approve, before you initialed it or after?

A. Before. [300]

Q. Before you initialed it?

A. Yes.

(Testimony of Otto H. Lauschel.)

Q. Well, when was there an agreement as to what points would be submitted to the rank and file arrived at?

A. On the 10th, in the afternoon of the 10th.

Q. When you got together with Eggers and Botkin to draw up these five points, was there any agreement between the four of you as to what the five points would be?

A. Yes, these five points, as well as these other oral, verbal points that we have been talking about.

Q. Well, was there any agreement as to what you would submit to the membership, among the four of you?

A. We couldn't absolutely, couldn't say what they were going to present to their membership. We presumed they would present everything that was involved in the settlement.

Q. Well, I don't quite understand, it isn't clear to me why you would have part of it typewritten, and part of it not typewritten. Can you explain that to me so I understand it?

A. Well, we were dealing in good faith to get this strike settled. We had to assume that the Union was doing the same thing.

Q. That is right.

A. (Continuing): Now, if they didn't understand it, why, we have no—we can't be held responsible for what they didn't do. [301]

Q. You still haven't answered my question as to why part of it was typewritten and part of it wasn't, if there was such an arrangement?

(Testimony of Otto H. Lauschel.)

A. Well, we were most concerned with protecting these men, for one thing, who had returned to work.

Q. Is that as close to an explanation as you can give, as good an explanation as you can give?

A. What is that?

Q. I say, you can't explain it any more clearly than that?

A. The rest of it was just points in which we were conceding to the Union what we would do, how we would handle promotions, vacations, and matters of that kind, those accepted.

Q. You said there was a lot of discussion about seniority. I believe, isn't the truth and the fact of the matter there wasn't so much discussion about seniority as there was about replacement of strikers, the people who had gone through the picket lines and the people who had returned back to work?

A. That is right.

Q. And seniority, itself, wasn't mentioned at all?

A. Oh, yes, it was mentioned, because when they had in there "without loss of seniority" we would not go for it.

Q. Didn't you tell them that it is a point that probably is of no importance anyway, because there is no danger of anybody being laid off for some time to come? [302]

A. That is right.

Q. After that was said, wasn't that the time when both parties agreed that the word "seniority" would be deleted from this typewritten paper?

(Testimony of Otto H. Lauschel.)

A. They had agreed to it before that. That was merely a comment as we closed the meeting that evening.

Q. And the meeting that you had with Mr. Botkin by himself, there was no agreement talked about that evening, simply a report, wasn't it, as to what the Union membership had been doing?

A. Yes, and, also, we asked him if he had presented all of the points involved in the settlement concerning their vacations and promotions and the status of the strikers.

Q. Now, you understood at this time, and both parties understood at this time, did they not—I will withdraw the question.

Q. You have had the policy, since you have been dealing with the C. I. O., to have all of your contractual relations reduced to writing, have you not?

A. Yes.

Q. And every time that you have had a modification of any contract, it had to be in writing?

A. That is right.

Q. That is right? And you have, also, thoroughly understood that whatever Union members have to deal with you as a [303] committee, that it always had to be adopted by the rank and file before it became effective as a contract modification?

A. That is right.

Q. And in this particular document you have in front of you, General Counsel's Exhibit, what is it, I can't remember, 5, the strike settlement, was

(Testimony of Otto H. Lauschel.)

not that prepared in your office? A. It was.

Q. And it was the points that you and this committee had mutually agreed to submit to the membership? A. That is right.

Q. And the Union was supposed to submit those points to the membership, that is the committee, if they kept faith with you, would submit those points?

A. Those and everything, all the conversations that had been going on, with the other points.

Q. Well, now, let's get back to that: Why would there be a change in their policy? What was there about this situation that would be a change of policy, if this was not part of it, it would have to be in writing?

A. You will have to understand that on Friday the time was running short. We had already agreed that if this was approved they would go to work the following Monday morning. We were under pressure, the Union was under pressure to get this settlement before their people. On Sunday evening we had no opportunity to do anything about it at all, all we had [304] was several copies of this.

Q. Do you recall what they call the railroad beefs, the railroad beefs?

A. Shortly after the strike?

Q. Yes. A. Yes.

Q. About how long was that after the strike?

A. Well, it started the morning that they went back to work.

(Testimony of Otto H. Lauschel.)

Q. I see. By the time it got to you as a beef, it was about how long after the strike had been settled?

A. I can't recall that.

Q. A week or two or three weeks?

A. Oh, it must have been at least that.

Q. Isn't it a fact at that time the beef came to you, it was a beef that involved the application of seniority and the Union was greatly alarmed that you were putting into effect what appeared to them at that time was this plan, this Company policy that we talked about this morning?

A. Mr. Botkin and Mr. Eggers appeared at our office, I believe, on the afternoon, either the morning or the afternoon, of the 13th, the day the men went back to work.

Q. And didn't they complain to you at that time on the conduct of the foreman and the way he was handling it, and didn't you make the remark to them that that foreman couldn't [305] have known what you had in mind for a policy, because there hadn't been anything out of your office to them to inform them?

A. No, that is not what we told them. We told them that we thought it was very much out of order for them to come in with a matter involving that kind of a situation before the men had even got back to work, until our foremen and superintendents knew how many men were coming back to work.

Q. I see, the foremen at that time, themselves,

(Testimony of Otto H. Lauschel.)

hadn't even been notified at that time, had they, as to what your policy was going to be?

A. No, not thoroughly, but we told both Eggers and Botkin that we thought they were entirely out of order coming that soon, until the policy had been thoroughly formulated as the result of the strike, and, also, until we knew how many men had come back to their jobs, and just where everyone stood.

Q. Well, Botkin was the man that brought that beef to you, wasn't he?

A. Botkin and Eggers, yes.

Q. He was the same Botkin, you and he were supposed to have had an agreement there when you settled the strike?

A. That is right, that is the reason we could see immediately that they had made some mental reservations when they initialed this, in regard to seniority, without loss of seniority. It became apparent to us almost immediately that [306] they weren't in good faith when they initialed this paper, and the things that went along with it.

Q. Well, they certainly didn't indicate to you at that time that there was any accord between the Company and the Union in regard to your interpretation of what that document said?

A. That is right.

Q. And that was right there within a moment of the time the strike was settled?

A. Within a day.

Q. The next day? Well, that brings it up pretty

(Testimony of Otto H. Lauschel.)

close. Just one other point: I copied down what I thought were your words, to the effect that they said they would take this piece of paper to the Local Unions to vote on. Do you recall having said that?

A. Well, that was our understanding that that is what they wanted to do.

Q. I see. And this piece of paper that you were referring to is that strike settlement that is sitting there on the desk in front of you?

A. That, and everything else that went with it.

Mr. George: I guess that is all.

Trial Examiner Leff: I would like to ask him some questions: I want to get a few things clear. Who prepared the proposal, first written proposal for a settlement, was [307] it the Company or the Union?

A. We prepared the first one in longhand, as I recall it, in Mr. Billings' office on the 9th.

Trial Examiner Leff: Who wrote it out?

Mr. Elder: Who do you mean by "we"?

A. Eggers, Mr. Eggers, Mr. Botkin, Billings, and myself.

Trial Examiner Leff: Now, who did the physical writing, can you recall, now, was it the Union representative?

A. I believe Mr. Billings did it and submitted these various things to the Union, and we clipped them off and put them back together and added, and the discussion went on all through this.

(Testimony of Otto H. Lauschel.)

Trial Examiner Leff: This was when, on October 10th?

A. October 9th.

Trial Examiner Leff: October 9th? Now, when you finished with your clipping and revision and everything else, how many points did you have?

A. Well, we had most of this.

Trial Examiner Leff: Did you have about five points?

A. Oh, I imagine so, it might have been something added after, I don't recall.

Trial Examiner Leff: Well, who prepared the document that you say contained the words "and without loss of seniority," which followed the words "return to work without discrimination"?

A. I don't recall, Mr. Examiner, whether we had a typewritten copy of that made before they left the office, or whether they just took the long-hand notes along with them, but they returned the next morning with a typewritten digest of the thing, which we reworked again the next morning.

Trial Examiner Leff: Now, when they returned with this typewritten digest of this thing, was it precisely this form except that it also included the words "without loss of seniority"?

A. No, that was in the afternoon after they had revised their first typewritten draft.

Trial Examiner Leff: Then, on the afternoon of the 10th did they come back with an instrument precisely in this form, except that it also had the words "without loss of seniority"?

A. Yes.

(Testimony of Otto H. Lauschel.)

Trial Examiner Leff: That was on the afternoon of October 10th, is that right? A. Yes.

Trial Examiner Leff: It did have the words, then, as a "basis for settlement of the present dispute between the I. W. A., the Potlatch Forests, Inc., proposed," then, there were five points just like that, save for that one exception that I have indicated?

A. Except for this "without loss of seniority."

Trial Examiner Leff: That is in Paragraph No. 2, "without loss of seniority"? At that time had they submitted to you a proposal for a settlement agreement, and, then, as I understand it, you objected to the words "and without loss of seniority"?

A. That is right.

Trial Examiner Leff: Is that correct? Now, did you state the reason for your objection?

A. Yes.

Trial Examiner Leff: And exactly what did you tell them?

A. Well, their seniority would be affected in case of a curtailment.

Trial Examiner Leff: Is that what you said?

A. Yes.

Trial Examiner Leff: Did you testify on direct examination that what you said was that you wanted to protect the rights of the workers who had been taken on during the strike?

A. I said both things, those two things were the reasons that we objected to that "without loss of seniority."

(Testimony of Otto H. Lauschel.)

Trial Examiner Leff: Now, what did the Union say as to that; before you go into that, why were you interested in a curtailment of operations, weren't you interested at that time principally in protecting the job status of the men who had been taken on as replacements during the course of the strike?

A. That was an immediate problem, but over the long haul that we had been working under this kind of a settlement, we could foresee curtailment at some time in the future.

Trial Examiner Leff: Now, what was bothering you about the curtailment, precisely what did you have in mind?

A. Well, at that time on the basis of the seniority as it stood in the contract, some of the men who would come back to work before the strike was settled would have lost, been out of a job.

Trial Examiner Leff: Yes, well, you were interested, weren't you, in protecting the rights of any person who came in as a replacement, is that so?

A. Yes.

Trial Examiner Leff: You felt that if a person replaced a striker during the course of the strike, he should have security as against the person who remained out on strike? A. That is right.

Trial Examiner Leff: Now, did you have anything else in mind? A. No.

Trial Examiner Leff: Well, this is rather important, so, I want you to think about it before you answer.

(Testimony of Otto H. Lauschel.)

A. We had no thought that we wanted to penalize any striker.

Trial Examiner Leff: You didn't intend to penalize any [311] striker, all you wanted to do was to protect the job rights of the man in the job just before the strike, isn't that right? A. Yes.

Trial Examiner Leff: Because he was a replacement for a man who was out on strike is that right?

A. That is right.

Trial Examiner Leff: And, then, when you proposed the deletion of the words "and without loss of seniority" what did the Union say to you?

A. They asked if they could be excused.

Trial Examiner Leff: Yes.

A. (Continuing): And went out in the hall, as I recall it was after the office had closed, I can't be just clear on that. In any event they went out and talked it over for a few moments, and came back with those words stricken out, and we said that was all right.

Trial Examiner Leff: Coming back for a moment to the point you were discussing before, you said you didn't want to penalize people who had been out on strike, is that right?

A. That is right.

Trial Examiner Leff: I take it by that that you mean you did not want to discriminate against people just because they went out on strike?

A. That is right. [312]

Trial Examiner Leff: Now, did you want to give

(Testimony of Otto H. Lauschel.)

to people who returned prior to the end of the strike, any special treatment as against those who remained out on strike?

A. No special treatment except for the protection of the job that they had taken.

Trial Examiner Leff: In other words, you didn't want a striker to come back and bump an employee who had come back to work during the strike, and had been given a job?

A. That is right, because, ordinarily, we wouldn't give these men special treatment over a returning striker when it came to promotion and so forth, the striker still had his promotion and advancement possibilities.

Trial Examiner Leff: Yes, well, did you want to give them special treatment in case of lay-offs?

A. We wanted him to stay on the job.

Trial Examiner Leff: The job which he had taken during the strike?

A. During the strike.

Trial Examiner Leff: And, then, I think I was up to the point where I asked you what the Union said when you proposed the deletion of the words "without loss of seniority"?

A. I don't recall whether they said anything or not, or whether they just took it out in the hall.

Trial Examiner Leff: You did testify on direct that they went out in a caucus, you said, is that right? [313]

A. Yes.

Trial Examiner Leff: Then, they came back and

(Testimony of Otto H. Lauschel.)

said they just deleted the words "without loss of seniority"? A. That is right.

Trial Examiner Leff: Did they say anything else at that point? A. Not that I recall.

Trial Examiner Leff: And, then, was anything said about, oh strike that. Did you, then, prepare a document deleting those two words "and without loss of seniority" and was that in the form that we have here in General Counsel's Exhibit 5?

A. Yes.

Trial Examiner Leff: And was anything said about submitting that form to the membership?

A. As I recall it, they said that is what they were going to do.

Trial Examiner Leff: Yes, at that time it was still a proposal for a settlement, was it not?

A. Yes.

Trial Examiner Leff: Then, did they come back to you later on October 12th and tell you that they had submitted it to the membership and that the membership had approved it?

A. Said it was approved.

Trial Examiner Leff: Yes, and did you initial it, then, [314] Mr. Billings initialed it?

A. Yes.

Trial Examiner Leff: And who initialed it for the Union? A. Mr. Botkin.

Trial Examiner Leff: And at the time the initials were put on, at that time it was no longer a proposal for a contract, it was the strike settlement agreement? A. Yes.

(Testimony of Otto H. Lauschel.)

Trial Examiner Leff: And did you think at that time that this strike settlement agreement embodied your full understanding? A. It did.

Trial Examiner Leff: You may examine.

Redirect Examination

By Mr. Elder:

Q. Mr. Lauschel, do you know what the Union submitted to their membership? A. I do not.

Q. You don't know whether it was merely this paper, or whether they had discussed in your meetings this question of seniority and back to work policy? A. I have no way of knowing.

Q. At this meeting on October 12th, did the Union agree to your proposal of the back to work policy? [315]

A. We took it that they did when they took this and the verbal part of the proposal to their membership.

Q. They didn't ever tell you that they were agreeable to this question of curtailment?

A. No.

Mr. Merrick: The witness indicated "no"?

A. No.

Trial Examiner Leff: As I understood, he said "No."

Q. (By Mr. Elder): If you had an agreement as to seniority, Mr. Lauschel, between you and the Union as to this return to work policy which you say that was the reason that the clause "without

(Testimony of Otto H. Lauschel.)

loss of seniority" was stricken out, why was no mention made in the affirmative in this memorandum as to seniority? In other words, your agreement as to seniority, why was that not set forth in this memorandum?

A. They didn't want it in there.

Q. Why.

A. Because they said they couldn't sell that type of a thing to their membership, they would rather not have anything said about seniority to complicate the settlement of the strike, and get the men back to work.

Q. But had they agreed to that seniority provision?

A. Apparently, they had, when they struck it out of there, that was our assumption, now, anyhow.

Q. Yes, we have discussed and talked about Mr. D. L. [316] Billings, Mr. Billings is dead?

A. That is right.

Q. When did he die?

A. June 20th of 1948.

Mr. Elder: That is all.

Trial Examiner Leff: Any further questions?

Mr. George: No further questions.

The Witness: Could I make one more short statement?

Mr. Elder: Yes.

Trial Examiner Leff: Well, that is irregular, I have no objection, if you speak to your counsel.

Mr. Elder: Yes, go ahead, Mr. Lauschel, any-

(Testimony of Otto H. Lauschel.)

thing you want to say.

The Witness: I can see that you are leading up, that you have been leading up to this being a very informal sort of a settlement agreement, and probably a lot of conversation which took place can't be recalled, but I would like to have you understand, Mr. Examiner, that we felt that we were dealing in good faith to get this strike settled, and we thought the Union was in the same position. We felt that Mr. Eggers and Mr. Botkin came up here with the idea to get this thing closed up and get those men back to work, and in spite of the practices that have been built up over the years about signed agreements and all of the signatures on these various papers, we were as anxious as they were to get the [317] thing settled and get the men back to work; therefore, perhaps in the mistaken idea that we were all dealing in good faith, we accepted this as sufficient evidence and sufficient agreement to get the men back to work, and get the thing running in an orderly way. Now, I think that since the end of this strike, our conduct of the matters of the men who have, who did return after the strike and before the strike, has been good, we haven't had any difficulties to amount to anything. These two cases that have been brought up here were very minor sort of affairs, and rather a weak limb on which to hang any kind of an argument. That should have been sufficient evidence in my opinion that we have carried out the terms not only

(Testimony of Otto H. Lauschel.)

of the written agreement, but of the verbal agreement to the best of our ability. That is all.

Trial Examiner Leff: Thank you.

(Witness excused.)

Mr. Merrick: Can we take a short recess?

Mr. Elder: We rest.

* * *

ALBERT F. HARTUNG

called and sworn as a witness in rebuttal on behalf of the National Labor Relations Board, testified as follows:

Direct Examination

By Mr. Merrick:

Q. What is your full name, Mr. Hartung?

Trial Examiner Leff: Excuse me, I want rebuttal to be rebuttal, nothing else.

Q. (By Mr. Merrick): What is your full name, Mr. Hartung?

A. Albert F. Hartung (spells) H-a-r-t-u-n-g.

Q. And what is your present address and occupation?

A. My present business address is Room 418 Governor Building, Portland, Oregon, and I am First Vice-president of the International Woodworkers of America. [322]

Q. You heard the testimony of Mr. Lauschel?

A. Yes, sir.

Q. At the time of your meetings with Mr. Lauschel, Mr. Hartung, what was your position at that time?

(Testimony of Albert F. Hartung.)

A. I was CIO Regional Director for the State of Oregon.

Q. Would you tell us in your own words, just when you were called in on this situation here, and tell us what took place in your meetings with Mr. Lauschel and Mr. Billings?

A. Well, I was called on or about October 4th, I believe, and asked if I would come up here with Mr. Brown, George Brown, who was or is the Director of Organization for the IWA to see if we could arrange for a meeting with Mr. Billings. We contacted Mr. Al Roth by phone, and Mr. Roth agreed to meet us in Portland. We met in Portland in the Portland Hotel in the room, and informed him of our desire to have him arrange a meeting for us with Mr. Billings. He stated that he would attempt to make such arrangement, and I believe it was the next day, or probably the day following, he called us by phone and stated that Mr. Billings was willing to meet. We came up here and met in the Company's office with Mr. Billings and Mr. Lauschel.

Mr. Elder: Could we establish that date?

A. I think it was on or about October 7th. At the meeting we discussed the Union's request for a 7½c wage increase to [323] wipe out a differential, and after some discussion the Company stated that they would not agree to any wage increase. We proceeded from there, and discussed the possibility of a strike settlement. Nothing was put

(Testimony of Albert F. Hartung.)

down in writing by either party as to the actual language that would be used. However, I made some notes on the possible basis of settlement, and so did Mr. Brown. The question of vacation with pay for those who had been out was discussed, and the Company indicated at that meeting their willingness to agree to some language that would not deprive these people from their vacation with pay. The only point we discussed quite broadly was the replacement of those people who had gone through the picket line, and particularly the new employees who had been hired, and the Company stated that they would not fire them, and we discussed the basis of settlement, and I recall that I stated to Mr. Billings and Mr. Lauschel that those type of settlements were not uncommon, that we had had experience with them before, and I believe I mentioned the Crown-Zellerbach strike settlement at Seaside, in which men on the job were not replaced, but that they would be given jobs at comparable pay. They thought that that could be worked out on that basis. We at no time discussed what the seniority status would be after everyone was back on the job. We most of all discussed what would be the program and policy of getting them back on the job. I recall that after we had more or less discussed what I have just stated, [324] that the two company officials, Mr. Billings and Mr. Lauschel, discussed the number that would be involved. They stated, well, there wouldn't be very many,

(Testimony of Albert F. Hartung.)

probably between forty and sixty, so that the problem wouldn't be a big problem in any way, and, also, the fact that at that particular time there were a considerable number of people out, and maybe thirty or forty of them wouldn't even report back for their jobs, so there wouldn't be any question whatsoever, and the question, then, was raised by the Company as to the Union maintenance clause in the contract. They stated that they didn't feel that they can go along with it the way it was. However, they stated that probably we could work out something that would be satisfactory on that matter, and we didn't go into the details. However, the point was established that that would be one of the points that would have to be cleared up. We, then, advised Mr. Billings and Mr. Lauschel, as has already been testified here by Lauschel, that we would have to refer our conversation and ideas to the proper officials of the International Woodworkers at that time, and ask them if they would be willing to meet with them, which they indicated they would. We didn't arrange for the next meeting at that time, because I did not know whether the International officers were available right at that time, until I got back to Portland. However, I believe I called myself, and stated that the International officers were available, and asked for them to meet with me, which meeting was arranged.

Q. And that was the last contact you had with the Company prior to the strike settlement?

(Testimony of Albert F. Hartung.)

A. That is right; I have negotiated with them in the last two years, but from that time on until about a year ago I had no contact with them.

Mr. Merrick: Your witness.

Direct Examination

By Mr. George:

Q. You heard Mr. Lauschel's testimony, Mr. Hartung, you sat here and listened to Mr. Lauschel's testimony?

A. Yes, sir, I did.

Q. And was there anything that could be construed as an agreement entered into between your people and the Company as to this back to work policy of the Company?

A. No, never was mentioned in our meetings, only as to what I have testified to.

Mr. George: That is all.

Cross-Examination

By Mr. Elder:

Q. Mr. Hartung, going back to this back to work policy, I understood you to say that it did come up in the meeting, and you had referred to some settlement down in Oregon that you had on that same question, where the men went back to work but didn't replace the men who had gone back to work [326] before the settlement, but were paid the wages that they had received from the strike?

A. That is right, I mentioned that case.

(Testimony of Albert F. Hartung.)

Q. And the Company at that time advised you that they did not want the men who had gone back to work replaced, but that they were willing to pay the same salary to the men who came back that they were receiving prior to the strike?

A. They said they would not discharge them.

Q. But that they would not replace the men that were there, is that right?

A. If they held someone else's job coming back, that at that time they would not replace them.

Q. But that the Company would pay the men the same salary that they had received prior to the strike? A. That is right.

Trial Examiner Leff: When this question of replacement was discussed, was it discussed with reference to replacement at the time of termination of the strike, or at some time in the future, if this were a curtailment operation?

A. Termination of the strike.

Trial Examiner Leff: Was anything said about curtailment operations at the meeting that you attended? A. No.

Q. (By Mr. Elder): Didn't you testify a moment ago, Mr. Hartung, that Mr. Billings had pointed out that they didn't expect a curtailment very soon? [327]

A. We never discussed curtailment whatsoever.

Q. I thought that was your statement?

A. But we never got into it; there was one other thing that we discussed briefly there, and that was

(Testimony of Albert F. Hartung.)

the fact that Mr. Billings did state that if we did effect a settlement that probably the box factory would not be able to start operation immediately. That was an additional point that was discussed.

Q. Do you remember the railroad grievances?

A. Only by hearsay.

Q. You didn't attend those? A. No.

Q. You did not attend those grievance hearings?

A. No, I did not.

Q. When did you first hear, Mr. Hartung, of this return to work policy that we have had so much discussion on here?

A. The first I heard of it was on April 14th of 1949, when I was handed a copy by the Conciliator in a meeting up in the Company's office.

Q. You had had no conciliation meetings prior to that time where this matter was discussed?

A. Yes, we had.

Q. In '48, for example?

A. In '48 we had complete negotiations, at which time it [328] was never brought up. We went through the contract that is Exhibit 2; we agreed to change the recognition clause.

Q. When was that?

A. Oh, that was a meeting held somewhere around April or May of 1948, I don't recall the exact date, the Spring negotiations, and we had settled on the Coast, and I came up here, then, to negotiate contracts in the Inland Empire. The exact date I couldn't say, it might vary thirty days one way or the other. However, at that meeting

(Testimony of Albert F. Hartung.)

we took Exhibit 2, and we went through it from the front page to the back page. There was only one point that the Union had won in the negotiations, which was 12½ an hour, including a retro-active date, and we changed the recognition clause and inserted the 12½ an hour, and I believe that there was one slight change made in the wage re-opening clause, and at that time we had no knowledge of nor were we advised in any way of the company policy. I had sought strike settlement. After we got through negotiating and the negotiated points had been signed by myself, Mr. Armstrong, for the Union, Mr. Armstrong was a member of the Northwest Regional Negotiating Committee and still is, and several representatives of the Company, of which one, I believe was Mr. Reddick, Reddick it was, then advised the Company negotiating committee that this would be referred to the membership for acceptance on objections. Then, I think Mr. Beardmore brought up the fact that he thought it was time [329] that they drew up a new contract, including the interpretations that the Union and the Company had agreed to incorporate into the contract. Mr. Gordon, Mr. Frank Gordon, the representative in this area, was present at that meeting, and I asked him if there were such agreements, and he said, "Yes," and he had them in his hand there, and we briefly checked over them to see that they were agreed to, and these did not contain anything about this so-called strike policy set-

(Testimony of Albert F. Hartung.)

tlement. And, then, later on, after the document which is marked here Exhibit 8 for the Government was drawn up, and this article on, I believe Page 18, was added.

Trial Examiner Leff: May I see Page 18, please?

A. (Continuing): At the end of the section.

Q. (By Mr. Elder): The Local agents here representing the Union did not advise you at that time that this policy was in effect?

A. Yes, we didn't discuss it one way or the other, a strike settlement, the question of vacation with pay in regard to the strike settlement was referred to in our negotiations, in which the Company stated that that would be carried out in the year 1948, and we went through the rest of the contract. Neither the strike settlement nor the so-called policy was brought before that committee.

Q. After this was delivered to you, referring to General Counsel's Exhibit No 8, did you have negotiation meetings [330] on this contract which you attended?

Mr. Merrick: Mr. Examiner, before we go on with this, I would like to object. I thought it wouldn't take long. I merely called this witness as a rebuttal witness. This is going far beyond the direct examination. I merely called him as a rebuttal witness regarding the testimony of Mr. Lauschel. I did not intend to go into what activity Mr. Hartung took part in regarding the subsequent negotiations with the company.

(Testimony of Albert F. Hartung.)

Trial Examiner Leff: Well, does this line of testimony bear in any way upon his direct?

Mr. Elder: Certainly it bears upon his direct, because he has stated here that he didn't know that this policy existed, and we will prove by this, if he admits it, that he attended meetings where this contract was discussed in 1948.

Mr. Merrick: He was merely called to give his version of his conversations with Mr. Lauschel in the summer of 1947.

Trial Examiner Leff: Objection overruled.

Q. (By Mr. Elder): In 1948, Mr. Hartung, didn't you have meetings on this contract?

A. I did not.

Q. You didn't attend any of the negotiations?

A. And I never received a copy of that.

Q. That your Local representative here, Mr. Gordon, did [331] not advise you of this contract?

A. Mr. Gordon advised me by phone and read me the contract over the phone, and I advised Mr. Gordon over the phone that we had agreed to no such a thing in our negotiations, and not to sign it.

Q. Well, you knew at that time that this strike provision was in there, didn't you?

A. No, I did not, when we signed the 1948 negotiating agreement, this document was not in existence; it was agreed that Mr. Beardmore would type it up, and it was delivered some three or four weeks after I left the territory.

Q. You testified that Mr. Gordon read you this contract over the phone?

(Testimony of Albert F. Hartung.)

A. Just that one clause.

Q. At that time you were aware of it, were you not?

A. Of that clause, yes.

Mr. Elder: That is all.

Trial Examiner Leff: I show you General Counsel's Exhibit No. 10, a document called the return to work policy; have you ever seen that prior to this hearing (hands paper to witness)?

A. Yes, sir.

Trial Examiner Leff: When did you first see it?

A. This is the document that was handed me by the [332] Conciliator in a meeting in the Company's office on or about April 14th, 1949.

Trial Examiner Leff: Was that the first time you saw it?

A. That is the first time I saw it.

Trial Examiner Leff: Was the document in that form, or a substantially similar form, ever shown to you during your negotiations for a strike settlement?

A. Never. I sent this to the boys, I sent that copy to the Board when I received it.

Trial Examiner Leff: Any further questions?

Mr. Merrick: I have nothing further.

Mr. George: No further questions.

(Witness excused.)

Mr. Merrick: I would like to call Mr. Jodie Eggers as my next rebuttal witness.

JODIE EGGERS

called and sworn as a witness in rebuttal on behalf of the National Labor Relations Board, testified as follows:

Direct Examination

By Mr. Merrick:

Trial Examiner Leff: Give your name.

A. Jodie G. Eggers (spells) E-g-g-e-r-s.

Q. (By Mr. Merrick): What is your address, Mr. Eggers? A. Box 66, Malheur, Oregon.

Q. And what is your present occupation?

A. I am business agent for Local 540 of the I. W. A. [333]

Q. And how long have you held that job?

A. Since 1941.

Q. What was the job that you held during the negotiations looking toward a strike settlement here at Potlatch?

A. I was a member of the Northwest Regional Committee, and was acting in that capacity.

Q. Now, you have been present during the entire course of this hearing? A. Yes.

Q. You have heard the testimony of Mr. Lauschel and Mr. Hartung? A. Yes.

Q. Could you give us your version of your meetings with Mr. Lauschel and Mr. Billings relative to the strike settlement of 1947?

Mr. Elder: Confine that to dates.

Trial Examiner Leff: Well, will you have him fix the date of each meeting that you are testifying about?

(Testimony of Jodie Eggers.)

A. Well, on or about the 9th of November, 1947.

Trial Examiner Leff: 9th of what?

A. October, 1947, meetings were held between Mr. Billings and Mr. Lauschel and Mr. Botkin and myself in the Company's offices here in Lewiston, relative to working out a basis of a tentative agreement of settlement of the then existing strike. During the process of these negotiations, various [334] points in question were discussed by the parties. At all times it was clear or made clear by myself and Mr. Botkin that we were acting in behalf of the Northwest Regional Negotiating Committee, that any tentative agreement that we might arrive at would be submitted to the membership as a basis of agreement of the strike. Eventually, a tentative agreement was reached and reduced to writing, and I believe it's herein contained as Exhibit 5, if I recall. This tentative agreement was taken to the membership involved and voted on by them as a basis of settlement for the strike.

Trial Examiner Leff: Well, I am interested in having the witness testify as to precisely what was said in connection with the deletion of the words "and without loss of seniority."

Q. (By Mr. Merrick): Mr. Eggers, you heard Mr. Lauschel testify regarding the meeting at which he said that an agreement was taken by the Union officials from the room and certain words were stricken from that agreement; do you recall any such incident?

(Testimony of Jodie Eggers.)

A. Yes, may I see a copy of it in the files? As I recall the incident, the Company had prepared in writing the basis of settlement. Mr. Botkin and myself had taken a copy of that, and after going over it with other members of the Union and the Negotiating Committee had proposed substantially, at least, as I remember, that the words "without loss of seniority" be added. In talking to the Company representatives, [335] Mr. Lauschel and Mr. Billings, about this, they objected to that language. In the process of the discussion, they made it quite clear they did not want any employees who were then working during the time of the strike, replaced by employees then on strike who would immediately be returning to work. After a certain amount of discussion on it, Mr. Botkin and I stepped into the hall and in caucus went over the tentative agreement and, then, considering it further, we recognized, of course, that the words there would be in conflict with a part of Article 2, the No. 2 part of it, relative to the replacement of employees then on the job, by employees coming back. As to those questions of seniority, we recognized that this agreement waived from the contract only to the extent as set forth in article 2 relative to the replacement of then working employees, inasmuch as Point 5 of the tentative agreement set forth that the present then existing contract would remain in effect without change except as provided in the Union's maintenance article, which

(Testimony of Jodie Eggers.)

had no bearing relative to seniority, that in our opinion the seniority proceedings of the contract under Article 5 would, then, prevail, and there would be no need, and it would lessen any confusion relative to seniority. That was the only change from the terms of the contract relative to seniority, was set forth in very, what we thought, clear language in Point 2 of the agreement. [336]

Trial Examiner Leff: Now, you have just testified that the Company representatives said that they wanted to have that clause "without loss of seniority" deleted, because they wanted to be sure that the people who had taken jobs or who had returned to work before the termination of the strike, would not be replaced, is that correct?

A. Correct.

Trial Examiner Leff: Now, in addition, what, if anything, was said about seniority rights in the event of a curtailment of operations?

A. The problem of curtailment was not gone into in any detail, and we assumed that any other problems on seniority would be provided by the article of the contract.

Trial Examiner Leff: Well, I don't care about assumptions; what was said about seniority in case of curtailment? What was said by the Company, and what was said by you?

A. I don't recall any mention of curtailment, as far as it would affect any employees as such.

Trial Examiner Leff: Well, did the subject of curtailment come up at all?

(Testimony of Jodie Eggers.)

A. Not to my recollection.

Trial Examiner Leff: Please proceed.

Q. (By Mr. Merrick): Mr. Eggers, at any time did you or Mr. Botkin agree that men who had returned to work prior to October 13th, should be granted superseniority? [337]

A. No, indeed, the full basis of the settlement was reduced to writing in order that it could be taken to the membership as we always operated, as a basis of settlement for the strike. We never agreed to any basis of so-called seniority other than the only deviation from the seniority article, as contained in the settlement, was set forth in Article 2 of the agreement or the tentative agreement.

Mr. Merrick: You may examine. Oh, pardon me.

Mr. George: You may examine.

Cross-Examination

By Mr. Elder:

Q. Do you remember at the meeting on October 10th when Mr. Billings and Mr. Lauschel and Mr. Botkin and yourself were present, that is the meeting where you went out into the hall and struck out the "without loss of seniority" out of the contract, do you remember Mr. Billings discussing that the only time that the question of seniority would come up would be at the time of curtailment, at the present time that they could not see any curtailment?

A. No, I don't recall that.

Q. You were not present, were you, Mr. Eggers,

(Testimony of Jodie Eggers.)

at the meeting on October 12th, when this was finally concluded, that is Sunday, October 12th, 1947?

A. I was under the impression that the tentative agreement had been reached prior to that time.

Q. There had been nothing in writing and signed up, had there? [338]

A. As I recall from memory, the tentative agreement had been reached and was taken to a portion of the membership on Sunday.

Q. You agree that an agreement had been reached, but it had not been reduced to writing, had it, Mr. Eggers, and signed?

A. It had been reduced to writing, because it was that written agreement that was taken to the membership.

Q. Was it signed up by the Union and by the Company?

A. Whether or not it had been initialed before or after, I am not sure.

Q. As a matter of fact, Mr. Eggers, wasn't this memorandum that you drew up, something that you wanted to take to your Union, that you were going to tell them was your agreement, when actually you had reached an agreement on October 10th, which was oral, and that were was nothing further signed, at the time you took this to the Union?

A. No, we had never reached any agreement that was oral. The only tentative agreement, and I think there is a very definite distinction there, that the

(Testimony of Jodie Eggers.)

only agreement or tentative agreement that we had arrived at was reduced to writing, and that written word was to be taken back to the membership as a basis of settlement.

Q. But you were not present when that memorandum was initialed, were you? [339]

A. I am not sure.

Q. Did you initial any memorandum?

A. I am not sure.

Q. As a matter of fact, you know that you were not present when that memorandum was initialed, don't you? A. No, I don't know that.

Q. Well, you know that you were not present at the meeting on October 12th, 1947, which was Sunday?

A. I don't recall having been to any meeting on October 12th, if that were on a Sunday.

Q. You knew a meeting was being held between Botkin and Billings and Lauschel on October 12th, 1947?

A. I don't know that I was aware of it.

Q. You know that that meeting was agreed upon on October 10th when you adjourned the meeting of October 10th, don't you, that you would meet again on October 12th, on Sunday?

A. I don't recall any definite date having been set. All of the meetings had been held and concluded, tentative to further meetings; as far as definite meeting dates and arrangements being made, I don't recall them as to the hour and exact dates.

(Testimony of Jodie Eggers.)

Q. What Local meetings did you attend to get approval on this memorandum?

A. I attended the one here in Lewiston, and one at Pierce.

Q. What day was that? [340]

A. From memory, the meetings were on Sunday. One, as I recall, during the day here, and the evening in Pierce.

Q. What was done at those meetings as far as presenting this to the Union?

A. It was the membership, you say to the Union, you mean the membership. The tentative, or basis of agreement, was read, re-read, and point by point explained and discussed by the membership and the officers.

Q. Did you explain to the membership that when they returned after the strike they couldn't displace the men who were already on the job?

A. I explained to them under Point 2 that as a man was on the job they would not take him off the job or replace him on returning to work, as per the Article 2 of the agreement.

Q. Do you remember what time the meeting was up at Pierce on Sunday?

A. As I recall, it was in the evening some time.

Q. You couldn't have attended the meeting here in the late afternoon around five or six o'clock and still have been in Pierce for that evening meeting, could you?

A. As I recall, I left here after the meeting was

(Testimony of Jodie Eggers.)

held here during the day, and went to Pierce that evening.

Q. Do you remember, you do remember those meetings, but you don't remember whether you attended the meeting with Mr. Lauschel and Mr. Billings and Mr. Botkin, their final meeting [341] on the settlement?

A. I said I didn't recall having met with them on Sunday.

Q. How far is Pierce from Lewiston, approximately? A. I don't know.

Q. How long did it take you to get there?

A. I don't recall, it is the first time, the first and only time I was ever over the road. I went with someone else.

Q. Do you remember the meeting in December of 1947 as to the settlement, after the settlement, when you met on the railroad grievances? You remember the railroad grievances that have been discussed here in the testimony today and yesterday?

A. I recall having heard of them; I wasn't through all the discussions on them.

Q. Do you recall attending the conciliation meeting? A. Yes.

Q. Hosey was present, and Conciliator Botkin was present, Gordon, McLarick and Malrich, and Turner? A. Where was the meeting held?

Q. Do you remember that the return to work policy was discussed at that time? A. No.

Q. What was it all about?

(Testimony of Jodie Eggers.)

A. I don't know, but I attended the same meeting that you are talking about.

Q. You remember the railroad grievance meetings, don't you? [342]

A. No, I don't. I wasn't in on all the railroad grievance meetings. I was in on it right after the settlement was reached, I think the following day I recall the grievance having arisen relative to the railroad, and there were future meetings, but I wasn't in attendance on all of them.

(Thereupon, the document above mentioned was marked as Respondent's Exhibit No. 3.)

Q. (By Mr. Elder): Mr. Eggers, I hand you Respondent's Exhibit 3 for identification, and ask you if you remember the conciliation meeting which was held, at which time this was presented to the meeting, and to you, or a copy of it (hands paper to witness)?

Mr. George: What is the date on that document?

Mr. Elder: December 9th, 1947.

Q. Do you remember that having been handed in to the meeting during that conciliation here, as being the understanding, the memorandum of the strike settlement agreement?

A. No, I don't recall having received this. This?

Q. Yes?

A. No, I don't recall of having been handed that.

Q. Didn't you, at that meeting, the return to

(Testimony of Jodie Eggers.)

work policy of the Company, wasn't it discussed at that meeting?

A. I don't recall that it was, other than in line with the return to work policy or agreement that was reached by the Company. [343]

Mr. George: Mr. Examiner, I would like to object to this line of questioning as having been no proper foundation laid, there is nothing in the record that shows that this man in truth and in fact did attend this meeting.

Mr. Elder: That is what we were trying to find out, is whether or not he did.

Trial Examiner Leff: Objection overruled.

Q. (By Mr. Elder): Have you even seen this before? A. No.

Q. Ever see the copy of it before?

A. Not to my recollection.

Q. You deny that in December of 1947 that you did not know that you knew—withdraw that.

Q. You deny Mr. Eggers that in December of 1947, that you knew about the return to work policy of the Potlatch Forests, Inc.?

A. I did not know about the return to work policy as set forth in this exhibit that has been numbered 10, that has been introduced here.

Q. When did you first know about the Company's return to work policy?

A. You mean as set forth in this return to work policy?

Q. Or similar to that, yes?

(Testimony of Jodie Eggers.)

A. I never had and haven't as yet saw this memorandum that the Company had drawn up relative to their return to work policy. [344]

Q. You realize that—

A. (Interposing): The only indication that I had run into was very shortly the next day or two right after the strike, when there was a question relative to some trainmen.

Q. And what happened at that hearing?

A. Well, Mr. Botkin himself attempted to meet with Mr. Lauschel and Mr. Billings, and did meet with him relative to it. The thing came to us as the outgrowth of statements made to some of the returning employees by some of the foremen. We were informed by Mr. Billings or Mr. Lauschel that some of the statements as they had came to us could not be correct, or that that wasn't right because the Company at that date had not as yet formulated or sent out, notified all of their foremen as to what the Company's policy or position was, and, that being the case, thought that we were more or less out of order or jumping to conclusions because of a report that had come in as to what one of their foremen's conversation had been with one of the employees.

Q. Actually what they told you was the time you had come in the day after the strike settlement, that these men were not all back at work, and to hold your grievances for a few days until all the men were back at work, isn't that correct?

(Testimony of Jodie Eggers.)

A. What I just told you is correct, that they had not sent out a policy nor had meetings with their foremen as to the extent that they could know what the Company's policy was, [345] and therefore, any arguments or statements made by those foremen or employees did not necessarily state what the Company's actual policy was.

Q. What was this policy that you heard at that time?

A. It was on the question as I recall, relative to a trainman who had returned to work after the strike, having been told by a foremen or supervisor that he had no seniority, and that he would be starting in as of the time he went to work.

Q. And that was at Headquarters, Idaho, that grievance?

A. I, frankly, I am not sure where it originated.
Mr. Elder: That is all.

Redirect Examination

By Mr. Merrick:

Q. For the sake of the record, will you state where Mr. William Botkin is at the present time?

A. Where he is?

Q. Yes?

A. It is my understanding that he is in or around Naches, Michigan.

Q. What is he doing down there?

A. He is representing the International Union in

(Testimony of Jodie Eggers.)

a strike that is now in progress with the Masonite Corporation.

Q. During the course of the year, about how many Union meetings do you attend? [346]

A. Pardon?

Q. During the course of the year, about how many Union meetings do you attend?

A. You say Union meetings, you mean regular scheduled Union meetings?

Q. Or various meetings of Union members, not necessarily regularly scheduled.

A. I would say approximately a hundred during the year.

Q. How many conciliation meetings would you attend usually during the course of a year?

A. You mean as to number of days, or individual grievances?

Q. Yes, how many days did you put in in conciliation work during the course of a year?

A. Needless to say, they may vary considerably, but during the last several years, perhaps, they would average thirty or forty days.

Q. Now, going back to the strike settlement which is Exhibit 5, General Counsel's Exhibit 5, what is your recollection when the agreement was reached by the parties, on what date?

A. On or about the 12th, as I recall, it may have been.

Q. Is it your recollection that the agreement was reached in a meeting that you attended?

(Testimony of Jodie Eggers.)

A. Yes.

Q. And, then, is it your recollection that there was a [347] Union vote on that? A. Yes.

Q. As a matter of course, under your Union constitution, could that agreement be signed without approval by the membership?

A. It could not be signed as an agreement.

Q. Will you explain that?

A. Well, I say, it could not be signed as an agreement until such time as it had been ratified by the membership. The only other instances as I recollect, we may sign a joint proposal or a joint basis of settlement, which, then, is ratified by the membership, and by, perhaps, employers involved. Those instances normally arise when you are dealing with associations and a broad committee.

Q. In other words, the agreement is not binding on the membership until they approve of it, is that it? A. That is correct.

Mr. Elder: That is all.

Mr. Merrick: Anything further?

Direct Examination

By Mr. George:

Q. Jode, as I understand, you were a member of the Regional Negotiating Committee?

A. That is correct.

Q. And your particular duty in this case was to settle [348] the strike? A. That is right.

Q. If it could be settled? And as soon as the

(Testimony of Jodie Eggers.)

strike was settled, did that end your duties in connection with the operation up here, was the matter, then, referred back to the Locals to handle their grievances?

A. Yes, after the strike had been settled, and within a very short time I left the vicinity, and the thing reverted to the Local level, and the International for any further handling, after the agreement had been reached and accepted by the membership and put into effect.

Q. Now, do you know whether or not there are instances where the Committee representing the Union and Company come to a tentative agreement, initial the agreement, and, then, it is submitted to the membership, who vote on it, and in which event, if the members either reject it or turn it down, that information itself is relayed, and if it is approved, the document doesn't receive any further signature?

A. Yes, that would be the normal procedure in any negotiations as conducted by the Union or Negotiating Committee.

Q. In other words, the document wouldn't necessarily have to be initialed after the membership had voted, it could be initialed before, and, then, the Company could be notified as to whether or not the membership had approved or disapproved?

A. It could be, yes. [349]

Mr. George: I don't have any other questions.

Trial Examiner Leff: I show you General Counsel's Exhibit No. 10, and ask you whether you have ever seen that before (hands paper to witness)?

(Testimony of Jodie Eggers.)

A. No, I have never seen this before.

Trial Examiner Leff: Was that shown to you at the meeting that you attended on or about October 10th, 1947? A. No.

Q. (By Mr. Elder): Do I understand from your testimony that if the officers of the Union sign an agreement, and the Company signs an agreement, it isn't a valid contract?

A. I said that the only instances where they may sign something prior to the membership voting on it, would be that they would sign a tentative or a proposed settlement of some negotiations, in which it would be understood that we depended upon the acceptance of the membership, and in most instances, the employers as well.

Q. Is that understanding a part of the agreement or is it verbal?

A. It's understood normally within the writing of the tentative agreement itself, and in some instances it has been agreed to, and generally initialed by a conciliator who may be sent in.

Q. In other words, this General Counsel's Exhibit No. 5 was not valid until it was approved by the membership? A. No. [350]

Q. What agreement did you make with the Company on that?

A. We made that agreement as a basis of settlement for the strike, if accepted by the membership.

Q. And that was a verbal agreement?

A. Pardon?

(Testimony of Jodie Eggers.)

Q. That was a verbal agreement between the officers of the Company and you?

A. It was understood that that was being arrived at as a tentative agreement which would be taken to the membership.

Q. There was no written provision in this contract that that was subject to approval by the Union, was there, the Union membership?

A. I don't read anything into it to that extent.

Trial Examiner Leff: The contract that was just referred to by Counsel for Respondent, is General Counsel's Exhibit No. 5.

Mr. Elder: That is all.

Q. You deny that you attended a conciliation meeting on the 9th of December, 1947, at which Mr. Hosey and Mr. Botkin and Mr. Gordon and Mr. Malrich and Mr. Turner were there, at which time General Counsel's Exhibit 3 for identification was presented to you and read by you and Mr. Botkin and Mr. Ezy, and Mr. Gordon and Mr. Malrich and Mr. Turner?

A. I did not deny that I was to such a meeting, I said [351] that I did not recall being to such a meeting, that I did not receive the copy as you indicated.

Q. Could you have received this copy? You deny that you ever received a copy of General Counsel's Exhibit No. 3, or Respondent's Exhibit No. 3?

A. I don't recall having ever seen it.

(Testimony of Jodie Eggers.)

Q. Did Mr. Botkin receive a copy of that at that meeting? A. I do not know.

Q. Well, you would know if this was presented to Mr. Botkin, wouldn't you?

A. I do not recall having been at the meeting.
Mr. Elder: That is all.

Trial Examiner Leff: Any further questions?
The witness is excused.

(Witness excused.)

Trial Examiner Leff: The next witness.

Mr. Merrick: I would like to recall Mr. Frank Gordon for about two questions.

FRANK GORDON

recalled as a witness on behalf of the National Labor Relations Board, in rebuttal, testified further as follows:

Direct Examination

By Mr. Merrick:

Q. You are the same Frank Gordon that testified earlier in this proceeding? [352]

A. Yes.

Q. Did you hear the testimony of Mr. Cummerford today? A. Yes.

Q. Just speak up a little bit, Frank. Do you recall meeting with Mr. Cummerford regarding a grievance of Claude Walters? A. Yes, I do.

Q. Can you recall what you said to Mr. Cummerford relative to such grievance?

(Testimony of Frank Gordon.)

A. Not entirely, it was an informal meeting such as we hold many times in regard to, I think, matters of that nature, and the meeting was principally to go over the records and try to determine who there was in various departments who had less seniority than Mr. Walters did, and as to the statement made by Mr. Cummerford this morning, I do not call the exact words. I certainly, we did not agree in the words as it was stated there, and the matter was referred to in this respect, that if the thing which was presented to us was true, that there wasn't much we could do about it, and it was very definitely understood there that we did not agree with the Company's policy on seniority, and that in looking through these records we come across several who had their seniority through strike reasons, and we come across some others that we had been told of some other jobs held by younger men, but was informed that those jobs were out of the question as far as Mr. Walters was [353] concerned, because they were too heavy jobs to handle by him. Now, we reserved, certainly, any definite statement on the matter until we had a chance to see Mr. Walters.

Q. Well, at any time did you agree that Mr. Claude Walters would turn down some particular job that he should have taken?

A. No, we reserved the right to see Mr. Walters, because, after all, we wanted his support on it.

Mr. Merrick: That is all I have of this witness.

(Testimony of Frank Gordon.)

Cross-Examination

By Mr. Elder:

Q. You heard Mr. Walters' testimony this morning, where he did state that he had turned these jobs down? A. That is right.

Q. Why didn't you file a grievance?

A. We had already filed the grievances, test grievances, on similar cases, and we were in preparation of our board case and decided to enter this in the board case without taking it through formal grievance procedure.

Q. Did you take in the conciliation meeting in December, 1947, of the railroad grievances?

A. Yes.

Q. Was Mr. Eggers present at that meeting?

A. I don't believe he was. As I remember it, there was only Mr. Botkin appeared for the Union.

Q. You remember, Mr. Gordon, this memorandum which is [354] General Counsel's Exhibit 3, having been presented at that meeting, or a copy of it (hands paper to witness)?

A. Yes, I remember something about that, but I don't know for sure that that is a copy of what was presented, because I never got one.

Q. Was the copy of it substantially in that form?

A. I recognize some of the stuff that is in that. I couldn't say that I ever got a copy; I never had a copy of that.

Q. Didn't the Union get a copy of it?

(Testimony of Frank Gordon.)

A. They may have, but I didn't get any.

Q. But you remember it being discussed at the meeting?

A. I remember parts of that. I couldn't recall all of it. I just glanced through it; there is parts I couldn't say I remember for sure at all.

Q. Well, this could be the memorandum that was presented there, couldn't it?

A. Possibly, I don't have one myself, I know that.

Mr. Elder: We will offer Respondent's Exhibit 3.

Mr. Merrick: I will object. I don't believe it has been sufficiently identified.

Trial Examiner Leff: Objection sustained.

Mr. George: Is this being offered in evidence?

Mr. Elder: It has been rejected.

(Thereupon, the document above referred to was rejected.) [335]

RESPONDENT'S EXHIBIT No. 3

Memorandum of Meetings in Lewiston for Settlement of Strike by I.W.A. Against Potlatch Forests, Inc.

Meeting October 9th in Company offices

Present for I.W.A.—Botkin and Eggers

Present for P.F.I.—Billings and Lauschel

Billings and Lauschel covered practically the same points with these men that were discussed

(Testimony of Frank Gordon.)

with Brown and Hartung laying stress on the fact that there would be no concession in the matter of a reduction in the present differential and that the men who had returned to work during the strike would be protected in the jobs they were holding when the strike was settled.

We also discussed the maintenance of membership clause in the contract and explained views as to the necessity of a revision which would protect anyone who had returned to work and who had been a member of the union from being forced to maintain membership or the company being asked to release such an employee or any other who had returned to work.

The following morning (Oct. 10th) Botkin and Eggers returned with a memorandum prepared for discussion. We jointly reworded and added to this memo to cover some of the points discussed the previous day.

Late that afternoon they asked for a further discussion and brought in a memorandum, substantially as it was, finally agreed to by both parties except that paragraph # 2 started out as follows: "All former employees of Potlatch Forests, Inc., will return to work without discrimination or loss of seniority . . . etc."

Mr. Billings told them that their memo was satisfactory except that we would not agree to the term "without loss of seniority." He then again stated our position in regard to protecting the men in the jobs they then held. If a striker returned to work

(Testimony of Frank Gordon.)

and found his job not open he would be given other work and paid at the rate of his regular job, but we would protect his seniority to his regular job or a similar one when it was open, but in no instance would he displace a man who had gone to work during the strike.

Mr. Billings also pointed out that the present vacation clause would require revision as all men who had been on strike for two months would not be qualified under the present interpretations. For that purpose a former employee's seniority would also be protected.

Mr. Billings told them that with these two things in mind he would like to have them re-write the seniority provision to meet our views.

Mr. Botkin and Mr. Eggers retired to discuss the matter and returned within a few minutes with the words "without loss of seniority" crossed out. Mr. Billings asked why they had passed up any mention of seniority and it was their opinion that they were going to have difficulty in selling the settlement to their membership and it would be best not to further complicate settlement by any reference to seniority.

Mr. Billings expressed the opinion that it probably was a matter which would not arise or affect anyone seriously until a major curtailment took place and at this time such a curtailment was not in prospect.

The agreement in its final form was initialed

(Testimony of Frank Gordon.)

by Mr. Botkin and Lauschel on Sunday evening, October 12th, in the presence of Mr. Billings.

/s/ OHL

Rejected July 12, 1949.

Q. (By Mr. Elder): Mr. Gordon, at this meeting which you say you attended in December, 1947, on the railroad grievances, wasn't that the meeting where this entire question of the return to work policy in the case of curtailment was discussed between the Union and the Company?

A. The entire return to work policy as it is presented here, as an exhibit, was never mentioned. The company maintained that these people had seniority, we maintained they didn't; there was no such thing as any policy that had been laid out, and they based their claim at that time on the interpretation of the strike settlement, I remember that very distinctly.

Q. And what was that interpretation, Mr. Gordon?

A. They interpreted that strike settlement to say that a man who stayed out on strike didn't have seniority.

Q. In other words, that he, in the case of curtailment, he could not replace an employee that was on the job prior to the strike settlement, is that correct?

A. Yes.

Q. What is your answer? A. That is right.

Q. So that in December of 1947, Mr. Gordon,

(Testimony of Frank Gordon.)

you had knowledge of the position of the Company as far as the strike settlement was concerned, didn't you?

A. Yes, we did, to a certain extent. [356]

Mr. Merrick: I will object to this line of questioning, it is clearly going beyond the scope of the direct. He was clearly called as a rebuttal witness.

Trial Examiner Leff: Objection overruled.

Mr. Elder: That is all.

(Witness excused.)

Trial Examiner Leff: I would like to recall Mr. Lauschel to the stand for a just a moment.

OTTO LAUSCHEL

recalled as a witness on behalf of the National Labor Relations Board, testified as follows:

Examination

Trial Examiner Leff: You may sit there if you want. I show you General Counsel's Exhibit 10, and ask you if you can recall the circumstances under which that was first prepared (hands paper to witness)?

A. Yes.

Trial Examiner Leff: Would you state what they were, please?

A. At the time, as soon as we became familiar with what kind of terms the Union was going to try to settle on, we thought we had better get it down in writing, so that our interpretation, as we interpreted the strike settlement, together with the

(Testimony of Otto Lauschel.)

verbal conversation that went with it would be uniformly administered throughout our organizations. [357]

Trial Examiner Leff: Well, when was this document, General Counsel's Exhibit 10, drafted, was it before or after the strike settlement agreement, General Counsel's Exhibit No. 5 was initialed by the parties (hands papers to witness)?

A. It was prepared in anticipation that this was going to be accepted.

Trial Examination Leff: Now, Exhibit 10 was prepared in the form of an agreement to be signed by the Union and by the Company, was it not?

A. I believe so.

Trial Examiner Leff: Now, did you ever, in fact, submit General Counsel's Exhibit 10 to the Union? A. No.

Trial Examiner Leff: Can you explain why you did not submit it? A. No, I can't.

Trial Examiner Leff: Did you ever show it to any representative of the Union during the course of the strike settlement agreement?

A. No, in fact after the strike settlement I just practically moved out of the picture as far as the details of the operation were concerned, I mean, the operation of the strike settlement.

Trial Examiner Leff: Well, that document, Exhibit No. 10, sets forth your return to work policy as you now apply it, is that correct?

A. That is right.

Trial Examiner Leff: Did you not think it im-

(Testimony of Otto Lauschel.)

portant enough to submit it to the Union for its consideration, if you felt it was a part of the strike settlement agreement?

A. I just can't recall what eventually happened with this particular document.

Trial Examiner Leff: It was prepared in a form which anticipated it might be signed by both the Union and the Company and become a form of agreement?

Mr. Beardmore: And the Conciliation service.

Trial Examiner Leff: Also the Conciliation service, is that correct? A. Yes.

Trial Examiner Leff: And yet you never did submit it to the Union? A. That is right.

Trial Examiner Leff: Was that because you felt that the particular provisions of that document had never been discussed or agreed to?

A. Not at all. We discussed it at one of these meetings that we had later on this railroad matter they called.

Trial Examiner Leff: You discussed it at that time, did you ever discuss it previously to that time?

A. Not except during the negotiations for the settlement [359] of the strike, the terms of that.

Trial Examiner Leff: What was the—when you were discussing the strike settlement, were you really discussing the replacement of employees hired during the strike by strikers, or were you discussing curtailment of operations? A. Both.

Trial Examiner Leff: Why was there a need at that time to discuss curtailment of operations?

(Testimony of Otto Lauschel.)

A. Because we were facing it sooner or later.

Trial Examiner Leff: But that had nothing to do with the strike, did it?

A. That had nothing to do with the strike except that we were protecting these men, not only just to get these men back to work, but for the duration of their employment with us.

Trial Examiner Leff: When you brought up this question during the negotiations, did the Union say anything about superseniority?

A. No, I never heard that word until after it was all over with.

Trial Examiner Leff: Did they make any objection at all? A. Oh, yes.

Trial Examiner Leff: What was their objection?

A. Well, they thought the men should return without loss of seniority to the exact position where they were in the [360] seniority list prior to the strike. That was unsatisfactory to us, except where it might affect the future employment of one of the men who had come back before the strike was ended.

Trial Examiner Leff: Did you want to give the men who had come back before the strike was ended, seniority over all strikers that did not return until after the strike was ended?

A. On the job on which they were holding at that time.

Trial Examiner Leff: Only the job which they were holding at that time? Did you intend, now,

(Testimony of Otto Lauschel.)

suppose you had a situation of this kind: Suppose you had two jobs in a department, one job was filled by A, we will call him A, who had returned from during the strike; the other job was filled by B, who returned after the strike. Now, B did not replace A, nor did A replace B, there were two separate vacancies. Now, did you intend at that time that A was to have seniority over B in any subsequent lay-off, even though A had been working with the Company for a shorter time than B?

A. Yes.

Trial Examiner Leff: Did you tell that to the Union in those words? A. Yes.

Trial Examiner Leff: During the strike negotiations? A. Yes. [361]

Trial Examiner Leff: What did the Union say?

A. Apparently they agreed, because they struck out that "without loss of seniority."

Trial Examiner Leff: Well, did they say they agreed to that, in so many words?

A. What else could you infer?

Trial Examiner Leff: Well, then, it was only an assumption on your part that they had agreed; did they ever say at any point during the course of the negotiations that they would not agree to that, or that they did not want to agree to that?

A. Not that I recall. Oh, they said it several times during the course, but eventually when they struck out those words, why, it was our assumption that they agreed.

(Testimony of Otto Lauschel.)

Trial Examiner Leff: Did you ask them whether that was their intention?

A. Well, we did again, we did mention it again.

Trial Examiner Leff: Well, let me ask you this question: Was it your intention to discriminate in favor of the employees who returned during the strike, as against those who remained out after October 12th?

A. On the job they were holding, yes.

Trial Examiner Leff: I don't quite understand what you mean by the addition of the words "the job they were holding"; would you mind explaining it? [362]

A. They couldn't be bumped out of that job either by an incoming man or by curtailment.

Trial Examiner Leff: Suppose a man returned during the course of the strike to a certain job, and, then, he was transferred from that job to some other job, would that superseniority apply even, then, in the case of a lay-off?

A. I am not just sure of that point, Mr. Examiner.

Trial Examiner Leff: Any further questions?

Mr. Merrick: I just have one question. Mr. Lauschel, do you remember when this document was prepared? A. No.

Q. You don't? You don't recall if it was prepared in this exact form? A. No.

Q. Did you see it after it had been prepared?

A. No, I never have.

Mr. Merrick: That is all.

(Testimony of Otto Lauschel.)

Mr. Elder: May I ask a few questions in an attempt to correct something?

Trial Examiner Leff: Yes.

Q. (By Mr. Elder): I call your attention, Mr. Lauschel, to Respondent's Exhibit No. 2, which has an attachment which is the return to work policy (hands paper to witness)? A. Yes.

Q. Now, when was that prepared, that return to work policy? [363]

A. Right after the men came back to work, I think, probably the next day, because I know that Mr. Billings had in myself and all of the key men in the management group, together with Mr. Beardmore and Mr. Troy, and explained just exactly what our interpretations of the settlement were, both the written settlement and the understood clauses as to vacations and promotions, and after that we asked them to prepare this thing as a policy under that interpretation.

Q. Now, you will note that this Exhibit No. 10, the body of it, is the same as your return to work policy, which is Exhibit No. 2, with the signatures added to it. When you testified that this was drawn right after the strike, were you referring to the body of it here, or actually to this instrument where the signatures had been added?

A. I didn't know anything about the instrument with the signatures at all; this is the only one I knew anything about.

Q. Could this have been drawn in connection with the negotiations that went on in 1949 regarding

(Testimony of Otto Lauschel.)

the extension of the contract?

A. It could have been.

Q. You have no knowledge of why these signatures were added on the bottom? A. No.

* * *

Mr. Elder: I would like to ask Mr. Hartung in connection with the questions asked Mr. Lauschel, Mr. Examiner, and he is changing the date that Exhibit No. 10 was given to him.

Q. Do you know, Mr. Hartung, why these signatures were added to this Exhibit No. 10, which is entitled Potlatch Forests, Inc., Return to Work Policy? In other words, wasn't it in connection with your negotiating on the renewal of the contract, the new contract?

A. That was presented to me at the last meeting we had with the Company where Conciliator C. C. Mann was present.

Q. And what was the purpose of that meeting, Mr. Hartung?

A. The purpose of that meeting was we were negotiating on the 1949 contract, and the Company had made a counter-proposal in which, a new proposal, in which they had changed from their original position, changing the language as a change in General Counsel's Exhibit No. 8. They had made a counter-proposal to this language "the strike settlement of October 12th, 1947, [371] shall control the application of the seniority article." Their counter-proposal at that time, I don't recall the exact wording, but rather than make reference to

(Testimony of Otto Lauschel.)

the strike settlement, it mentioned the Company strike policy. At that time I asked what they were talking about, and Mr. Seaman, the Conciliator, he also was curious and, then, the Company representative supplied Mr. Seaman with this document known as the Board's Exhibit.

Mr. Elder: I think this is immaterial to the issue, but all I wanted to get out of the witness if he will admit it, is that this was presented to you in connection with your negotiations of the 1949 contract? A. That is right.

Q. And that is why those six lines on the bottom, they were never signed, but that is why they are on there?

A. I don't know that. I didn't know that was a copy they prepared right at that time, or whether it was one that had been prepared some time ago, I didn't ask one way or the other.

Q. But it was in connection with the 1949 contract? A. That is what I got. [372]

* * *

Mr. Elder: We would like to renew our motion which we presented at the beginning and at the end of the Government's case, to dismiss.

Trial Examiner Leff: The motion is on the ground that there isn't sufficient evidence to support the allegations of the complaint.

Mr. Elder: And further that they have not complied with the National Labor Relations Board's

act, as amended, and specifically Section 9, sub-section G and sub-section H, and for the further reason that the complaint is barred by the statute of limitations under Section 10-B of the National Labor Relations act, as amended, and that it does not set forth facts sufficient to constitute an act, and that they have not presented sufficient evidence.

Trial Examiner Leff: The decision is reserved on the motion insofar as it seeks dismissal of the complaint for insufficiency of proof, for the reasons indicated at the beginning of the hearing. The motion insofar as it seeks to dismiss the complaint on the ground that Section 9, F, G and H, had not been complied with, and on the further ground that the [373] allegations of the complaint are barred by the statute of limitations, is denied. Any further motion? [374]

Received July 26, 1949.

[Endorsed]: No. 12532. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Potlatch Forests, Inc., Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed May 1, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 12532

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

POTLATCH FORESTS, INC.,
Respondent.STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

In this proceeding petitioner, National Labor Relations Board, will urge and rely upon the following points:

1. The Board's findings of fact are supported by substantial evidence on the record considered as a whole.
2. The Board's conclusions of law are in accord with the applicable statutes and judicial decision.
3. The Board's order is in all respect valid and proper.
4. A decree should be entered enforcing the Board's order in full.

/s/ A. NORMAN SOMERS,
Assistant General Counsel.

Washington, D. C.
April 25th, 1950.

[Endorsed]: Filed May 1, 1950.

act, as amended, and specifically Section 9, sub-section G and sub-section H, and for the further reason that the complaint is barred by the statute of limitations under Section 10-B of the National Labor Relations act, as amended, and that it does not set forth facts sufficient to constitute an act, and that they have not presented sufficient evidence.

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Filed May 1, 1950.

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Clerk of the United States Court of Appeals for
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United States Court of Appeals
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4. A decree should be entered enforcing the Board's order in full.

/s/ A. NORMAN SOMERS,
Assistant General Counsel.

Washington, D. C.
April 25th, 1950.

[Endorsed]: Filed May 1, 1950.

[Title of Court of Appeals and Cause.]

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. II, Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Potlatch Forests, Inc., and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Potlatch Forests, Inc., and International Woodworkers of America, Local 10-364, C.I.O., Case No. 19-CA-166."

In support of this petition the Board respectfully shows:

(1) Respondent is a Maine corporation engaged in business in the State of Idaho, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with

this Court herein, to which reference is hereby made, the Board on December 21, 1949, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, and its officers, agents, successors, and assigns. The aforesaid order provides as follows:

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Potlatch Forests, Inc., and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining or giving effect to any seniority or lay-off policy which discriminates against any of its employees with regard to the order in which they are to be selected for lay-off, or with regard to any other aspect of their employment relationship, on the basis of whether they had or had not engaged in strike or concerted activities, or on the basis of the period during which they had engaged in such strike or concerted activities;

(b) Discouraging membership in International Woodworkers of America, Local 10-364, C.I.O., and its parent organization, International Woodworkers of America, C.I.O., or any other labor organization of its employees, by in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of employment.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post immediately at its Clearwater plant at Lewiston, Idaho, copies of the notice attached hereto, marked Appendix A.¹ Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(b) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the receipt of this Intermediate Report what steps the Respondent has taken to comply therewith.

(3) On December 21, 1949, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

¹In the event that this Order is enforced by a decree of a Circuit Court of Appeals, there shall be inserted before the words, "A Decision and Order" the words, "Decree of the United States Court of Appeals Enforcing."

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceedings before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondent, and its officers, agents, successors, and assigns to comply therewith.

NATIONAL LABOR
RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this day of

Appendix A

Notice to All Employees

Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not maintain or give effect to any seniority or lay-off policy which discriminates against any of our employees with regard to the order in which they are to be selected for lay-off, or with regard to any other aspect of their employment relationship, on the basis of whether they had or had not engaged in strike activities, or on the basis of the period during which they had engaged in any such activities.

We will not discourage membership in International Woodworkers of America, Local 10-364, C.I.O., and International Woodworkers of America, C.I.O., or in any other labor organization of our employees, by in any other manner discriminating against any of our employees in regard to their hire or tenure of employment, or any term or condition of their employment.

All our employees are free to become or remain members of any labor organization. We will not discriminate in regard to tenure of employment or any term or condition of employment against any

employee because of membership in or activity on behalf of any such labor organization.

POTLATCH FORESTS, INC.,

.....

(Employer)

By.....

(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Endorsed]: Filed May 1, 1950.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America

To International Woodworkers of America, Attn:

Mr. Albert Hartung, 418 Governor Bldg., Portland, Oregon

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 1st day of

May, 1950, a petition of the National Labor Relations Board for enforcement of its order entered on December 21, 1949, in a proceeding known upon the records of the said Board as "In the Matter of Potlatch Forests, Inc., and International Woodworkers of America, Local 10-364-C.I.O., Case No. 19-CA-166," and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 1st day of May in the year of our Lord one thousand, nine hundred and fifty.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

Return on Service of Writ

United States of America,
District of Oregon—ss.

I hereby certify and return that I served the annexed Order to Show Cause on the therein-named

International Woodworkers of America by serving Albert Hartung by handing to and leaving a true and correct copy thereof with Albert Hartung personally at Portland, Oregon, in said District on the 8th day of May, 1950.

JACK R. CAUFIELD,

U. S. Marshal,

By /s/ NORMAN W. COCHRAN,
Deputy.

Docket No. 13841 Cause No. 12532

[Endorsed]: Filed May 11, 1950.

CA No. 12532

United States of America—ss.

The President of the United States of America

To Potlatch Forests, Inc., Attn: Mr. George W. Beardmore, Lewiston, Idaho, and International Woodworkers of America, Local 10-364-CIO, 418 Weisberger Bldg., Lewiston, Idaho,

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 1st day of May, 1950, a petition of the National Labor Relations Board for enforcement of its order entered on De-

ember 21, 1949, in a proceeding known upon the records of the said Board as

“In the Matter of Potlatch Forests, Inc., and International Woodworkers of America, Local 10-364, C.I.O., Case No. 19-CA-166,”

and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 1st day of May in the year of our Lord one thousand, nine hundred and fifty.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

Return on Service of Writ

United States of America,
District of Idaho—ss.

I hereby certify and return that I served the annexed Order to Show Cause and Copy of Petition for Enforcement of an Order on the therein-named

Potlatch Forests, Inc., by handing to and leaving a true and correct copy thereof with H. L. Torsen, secretary and treasurer and statutory agent for the Potlatch Forests in Idaho personally at Lewiston, Idaho, in said District on the 15th day of May, A.D. 1950.

EVERETT M. EVANS,
U. S. Marshal.

By /s/ J. BRUCE BLAKE,
Deputy.

Marshal's Expense \$14.64.

Return on Service of Writ

United States of America,
District of Idaho—ss.

I hereby certify and return that I served the annexed Order to Show Cause and Copy of Petition for Enforcement of an Order on the therein-named International Woodworkers of America, Local 10-364-CIO, by handing to and leaving a true and correct copy thereof with William Angove, president of Local 10-34-CIO, personally, at Lewiston, Idaho, in said District on the 15th day of May, A.D. 1950.

EVERETT M. EVANS,
U. S. Marshal.

By /s/ J. BRUCE BLAKE,
Deputy.

[Endorsed]: Filed May 22, 1950.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCE-
MENT OF AN ORDER OF THE NA-
TIONAL LABOR RELATIONS BOARD

Now comes the Potlatch Forests, Inc., a Maine corporation authorized to do buisness in the State of Idaho and through its attorneys, R. N. Elder and George W. Beardmore, and for answer to a petition heretofore filed in said cause for enforcement of an order of the National Labor Relations Board says:

I.

It admits that it is a Maine corporation engaged in business in the State of Idaho within the Ninth Judicial Circuit, but denies that any unfair labor practice occurred as alleged in said petition or as alleged by the National Labor Relations Board or that it is or has ever engaged in any unfair labor practice within the meaning of the National Labor Relations Act, as amended.

II.

Further answering said petition, it denies that there has ever been any original jurisdiction of said cause in said National Labor Relations Board for the following reasons:

1. That said Complaint did not conform to the National Labor Relations Act, as amended, or the rules and regulations issued by the Board in that the Complaint failed to set forth facts sufficient to state an unfair labor practice within the mean-

ing of Section 8 (a), Subsection (1) and (3) of said Act.

2. That the bargaining agent has not fully complied and is not in full compliance with the National Labor Relations Act as amended and particularly Section 9 (f), (g), and (h). That the International Union and each of its agents and local Unions, namely Locals 10-119, 10-358, 10-361, and 10-364, having members among the employees in the bargaining unit are disqualified from using the processes of the National Labor Relations Board by reason of said non-compliance.

3. That the proceedings as set forth in said Complaint are barred by the statute of limitations being Section 10 (b) of said National Labor Relations Act, as amended.

III.

Respondent further says in answer to said petition that no violation or violations of the National Labor Relations Act, as amended, have ever occurred on the part of said Respondent, Potlatch Forests, Inc., and its agents, officers, servants or employees and that the proofs and testimony taken before the trial examiner, as set forth in the record, fail to indicate any such violations, but rather and instead show a distinct compliance with the provisions of said Act and the provisions of the order of the National Labor Relations Board based upon any such alleged violations are entirely without basis in fact.

IV.

Respondent further says in answer to said peti-

tion that the International Union and the four local Unions constitute the bargaining agent and the bargaining agent and each of its component units is disqualified from using the processes of the National Labor Relations Board due to the fact that there has not been full compliance with the National Labor Relations Act, as amended, and particularly Section 9 (f), (g) and (h).

V.

Respondent further says in answer to said petition that the policy and practices from which the company has been ordered to cease and desist were established by agreement with the union officials who settled an existing labor dispute and maintained and followed said policy and practices with the knowledge and acquiescence of the bargaining agent for a period of over six months prior to the filing of the charges by the bargaining agent. That the proceedings are barred by the statute of limitations and said complaint should have been dismissed by reason of Section 10 (b) of the National Labor Relations Act, as amended.

VI.

Respondent further says in answer to said petition that the Company in following a policy and seniority practices set up in accordance with the provisions of a strike settlement agreement negotiated by the bargaining agent, which policy protects the seniority of strikers for all purposes except in the event of curtailment is not an unfair labor practice

within the meaning of Section 8 (a), Subsection (1) and (3) of the National Labor Relations Act, as amended, or either of them.

VII.

Respondent further says in answer to said petition that it believes that in all instances its management and supervisors and employees fully complied with the National Labor Relations, as amended, and committed no violation thereof.

VIII.

Respondent further says in answer to said petition that the Findings of Fact of the National Labor Relations Board are not supported by substantial evidence or at all. That the conclusions of law entered by the Board are not in accord with the Statutes and judicial decisions.

Wherefore, the said Potlatch Forests, Inc., Respondent herein, prays this Honorable Court that said order of said National Labor Relations Board be set aside in its entirety as provided in Section 10 (e) in said National Labor Relations Act, as amended, upon the grounds and for the reasons hereinabove set forth and that the petition of the National Labor Relations Board be dismissed.

/s/ R. N. ELDER,

/s/ ROBT. H. ELDER,

/s/ SIDNEY E. SMITH,

/s/ GEORGE W. BEARDMORE,

Attorneys for Respondent.

State of Idaho,
County of Kootenai—ss.

R. N. Elder and George W. Beardmore, being first duly sworn, state that they are counsel for the Potlatch Forests, Inc., Respondent herein, and that they are authorized to and do make this verified answer on behalf of the said Potlatch Forests, Inc. That they have caused to be prepared and have read the foregoing Answer and have knowledge of the contents thereof and the statements made therein are true to the best of their knowledge, information and belief.

/s/ R. N. ELDER,

/s/ GEORGE W. BEARDMORE.

Subscribed and sworn to before me this 23 day of May, 1950.

[Seal] /s/ SIDNEY E. SMITH,
Notary Public for the State of Idaho. Residing at
Coeur d'Alene.

My commission expires 12/2/50.

State of Idaho,
County of Kootenai—ss.

R. N. Elder, being first duly sworn, deposes and says that he has served the annexed Answer to Petition for Enforcement of the National Labor Relations Board, designation of record, and appearance upon the National Labor Relations Board by placing a true and compared copy of the same in a

duly stamped envelope, addressed to the National Labor Relations Board in care of A. Norman Somers, Assistant General Counsel in Washington, D. C., this 23 day of May, 1950.

/s/ R. N. ELDER.

Subscribed and sworn to before me this 23 day of May, 1950.

/s/ SIDNEY E. SMITH,
Notary Public for the State of Idaho, Residing at
Coeur d'Alene.

[Endorsed]: Filed May 25, 1950.

NO. 12532

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

POTLATCH FORESTS, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT N. DENHAM,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

A. NORMAN SOMERS,
Assistant General Counsel,

FANNIE M. BOYLS,

ALBERT M. DREYER,

MAURICE ALEXANDRE,

*Attorneys,
National Labor Relations Board*

FILED

1941-1942

PAUL H. DODGE

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**In the United States Court of Appeals
for the Ninth Circuit**

NO. 12532

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

POTLATCH FORESTS, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. 111, Secs. 151, *et seq.*),¹ for enforcement of its order (R. 80-83)² issued on December 21, 1949, against respondent Potlatch Forests,

¹The pertinent provisions of the Act are set out in Appendix A, *infra*.

²In the following statement references preceding the semicolon, if one appears, are to the Board's findings; succeeding references are to the supporting evidence. References to the printed Record are designated "R"; occasionally references are made to testimony or exhibits which are not included in the printed record but which are set forth in Appendix B to this brief.

Inc., following the usual proceedings under Section 10 of the Act. The Board's decision and order are reported in 87 NLRB, No. 118. This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor practices having occurred within this judicial circuit, at respondent's Clearwater plant in Lewiston, Idaho.³

STATEMENT OF THE CASE

The Board's order is based upon its finding that respondent violated Section 8 (a) (3) and (1) of the amended Act by laying off two of its employees, Cloninger and Walters, pursuant to a policy by which, in the event of a reduction in force, employees who were hired during, or returned to work prior to, the termination of an economic strike on October 13, 1947, are retained in respondent's employ in preference to those who did not return to work until the strike was settled.

The issues before this Court are:

(1) Whether the Board properly found that application to employees of a layoff policy which discriminates against them on the basis of whether or not they remained on strike until the strike termination date con-

³Respondent, Potlatch Forests, Inc., a Maine corporation having its principal office and place of business in Lewiston, Idaho, is engaged in felling timber and manufacturing lumber and Lumber products, operating sawmills and manufacturing plants at Lewiston, Potlatch, and Coeur d'Alene, Idaho, and conducting logging operations, one at Headquarters, Idaho, and vicinity, and the other at Bonville, Idaho, and vicinity (R. 27; 2, 8). The value of the products manufactured by respondent annually is in excess of \$1,000,000 (R. 27; 3, 8). These products are shipped by respondent from its plants in Idaho to customers in various States of the United States (*ibid.*). The respondent admits that it is engaged in commerce within the meaning of the Act (R. 27; 3, 9) and no jurisdictional issue is presented.

stitutes a violation of Section 8 (a) (3) and (1) of the amended Act;

(2) Whether the Board is barred under the 6 months limitation proviso to Section 10 (b) of the amended Act from finding that respondent engaged in the unfair labor practice here involved; and

(3) Whether the Board may properly issue a complaint where the local which filed the charges and the international union with which it is affiliated are in compliance with the filing requirements of Section 9 (f), (g), and (h) of the amended Act but two other locals which belong to the same bargaining unit with the charging local have not complied with those filing requirements.

I. The Board's Findings

A. Background

1. *Contractual Relations between Respondent and the Union.*

The International Woodworkers of America, C.I.O., herein called the IWA, was certified by the Board on March 4, 1944 and has since been the recognized exclusive bargaining agent of respondent's production and maintenance employees in a bargaining unit embracing respondent's five operations (R. 28; 3, 9). On April 1, 1946, a collective bargaining agreement, styled Master Working Agreement, was executed by respondent, on the one hand, and, on the other, jointly by the IWA and each of its four constituent locals (namely, Locals 10-119, 10-358, 10-361, and 10-364) which number among its members employees of respondent's various operations (R. 28; 93-98). The IWA and its four locals, jointly, are referred to in the Master Agreement as the Union, and they will so be referred to in this brief.

The Master Working Agreement expressly recognized that the principle of seniority should govern retention of

jobs during any curtailment of operations (R. 28; 95). Detailed provision was made for the application of this principle. Among other things, the agreement provided (R. 29; 96):

All seniority shall be considered first by job classification, second by department, and last by plant. It shall be used as a basis for preference in shift as well as promotion and in event of curtailment or during slack work periods an employee demoted shall go down through the same route by which he progressed.

Under the seniority system provided by the Master Working Agreement, all common labor jobs in a given department were regarded as lying in a pool (R. 29; Tr. 190-191). An employee in the common labor classification was entitled to retention rights in his particular department on the basis of his seniority there (R. 29; 94-98). And, if his tenure was insufficient to allow him to retain his job in his department, he could exercise his plant seniority to claim retention rights over any similarly classified junior employee in the plant for whose job he was qualified (*ibid*). In no event could such an employee, upon a reduction in force, be forced out of his department ahead of another employee similarly classified who had less department seniority and less plant seniority and whose job he was capable of filling (R. 29-94-98, Tr. 190).

The Master Agreement of April 1, 1946, ran for a term of 1 year (R. 30; G. C. Ex. 2). Before its expiration date, negotiations were begun for a new contract (R. 30; 101-103). By May 28, 1947, respondent and the Union had reached agreement on all dispute points, save the Union's demand for the elimination of an area wage

differential (*ibid.*). The agreement of the parties was embodied in two written memoranda, dated May 7 and May 28, 1947 (R. 30; 101, 102, G. C. Ex. 3 and 4). These in substance, set out the parties' interpretation and clarification of certain clauses of the 1946 Master Agreement that had been in dispute; made certain revisions with regard to wages; and provided for an extension of the 1946 Master Agreement, subject to the modifications noted, until April 1, 1948 (*ibid.*). The seniority provisions of the former agreements were left unchanged, except for a minor interpretation not here material (*ibid.*). The issue of the wage differential, alone, was left open for future negotiations (R. 30; 103).

2. *The Strike and the Strike Agreement.*

Negotiations on the wage differential issue having reached an impasse, the Union on August 7, 1947, called an economic strike of the respondent's employees (R. 30; 103-104). The strike at first resulted in a complete shut-down of all the respondent's operations (R. 30; 90). But starting about the end of August, employees began to return to work across the picket lines, and respondent also hired some new employees as replacements for the strikers (R. 30; 90, 150). By October 10, 1947, some 1,750 employees were working in the bargaining unit, which normally has a complement of about 2,600 (R. 31; 262-263).

With its strike apparently hopelessly lost, the Union sued for peace. After a number of meetings, representatives of the Union and of respondent settled upon a written form of memorandum embodying five points which the negotiators had agreed upon as a basis for settlement of the strike to be submitted to the Union membership for approval (R. 31; 255, 257, 304). Union representatives had made it clear during the negotiations that

any agreement reached would be only tentative until approved by the Union membership (*ibid.*). The memorandum, which was not signed or initiated at that time, read as follows (R. 32; 106):

As a basis for settlement of the present dispute between the IWA and the Potlatch Forests, Inc., the following is proposed.

1. The union agrees to withdraw its demands for a 7½¢ wage increase to eliminate the differential. Wages to remain at rates as of August 6, 1947. Picket lines be withdrawn as of October 13, 1947.

2. All former employees at Potlatch Forests, Inc., will return to work *without discrimination*, on Monday, October 13th. Former employees shall return to work by October 22, *to protect their job rights*. In the event the job formerly held by the returning employee is not open, the employee will be given other work and receive pay on the basis of the rate paid on his former job.

3. Men previously on gypo basis will be assigned to gypo work if still available. If gypo work is not available, pay will be at the rate shown in wage schedule for the job.

4. The Company has informed the Union that the night shift of the box factory in the Clearwater Mill cannot be started at this time, due to business conditions, and for that reason, it may not be able to employ all of the former box factory workers immediately. These box factory workers will be given preference over new employees in filling vacancies in other departments.

5. *The present contract will remain in effect without change* except that the following is substituted for the 4th paragraph in Article VII.

As a condition of continued employment, every employee who confirms to the Company his membership in the Union as of November 29, 1947, or becomes a member of the Union after November 20, 1947, shall be required to maintain his membership in good standing. (*Italics supplied.*)

On October 11, the strike settlement proposal in the form set out above was submitted to membership meetings of the several locals involved, voted on by the membership, and approved (R. 33; 109, 310). On October 12, the strike settlement memorandum, in the precise form set out above, was dated and initialed by the respective representatives of respondent and the Union (R. 33-34; 288).

On October 13, 1947, in compliance with the strike settlement agreement, the Union terminated the strike and withdrew its pickets (R. 34; 91).

3. *The Inauguration by Respondent of Its "Return-to-Work Policy",
With "Strike Seniority"*

Shortly after the strike settlement agreement was signed, a group of respondent's higher management officials determined upon and drafted a so-called "Return-to-Work Policy" (R. 34; 245, 328-330, 334). The text of the Policy, to the extent applicable to the issue of this case, is as follows (R. 34; 124):

POTLATCH FORESTS, INC. — RETURN TO
WORK POLICY

Employees who returned to work October 13th to 22nd inclusive, 1947, will, in case of curtailment, be laid off ahead of employees who returned to work or were hired on or before October 12, 1947 (settlement date). The order of layoff in each

group will be based on each person's previous seniority rights.

Employees who returned to work on or before October 12, 1947, reestablished their previous seniority for *all purposes*. Employees who returned to work October 13 to October 22, inclusive, 1947, reestablished their previous seniority for purposes of curtailment as among this group (returning October 13 to 22, incl.), and for training and *promotion among all groups*.

Employees who returned to work on or before October 22, 1947, but whose jobs had been filled while they were on strike will be given an opportunity to return to their old jobs at the first opening occurring. If this opportunity is passed up, then the employee's rate will revert to the rate of the job he holds and he will have no further right to return to his old job.

* * *

Employees who returned to work on or before October 22, 1947, will retain all previous seniority rights for purposes of training and promotion.

Former employees who returned to work, after October 22, 1947, will be classed as new employees.

The preference given by this policy to employees who returned to work or were hired before the end of the strike, October 13, 1947, over those who did not return to work until the strike was over was referred to in the evidence, and is hereinafter sometimes referred to as "strike seniority." It was stipulated by respondent that since the termination of the strike it has continued to maintain and give effect to the seniority principles set out in its "Return-to-Work Policy" (R. 36; 247-249).

The "Return-to-Work Policy" was drafted by officials of the respondent without consulting the Union (R. 36; 329). After it was drafted, it was neither submitted to any Union official nor was it printed or otherwise generally publicized among the employees in the respondent's plants (R. 36; 221, 223, 234, 252, 254, 257-258). Employees were made aware of "strike seniority" only if they as individuals inquired concerning their own relative seniority status (R. 36; 223, 234). It was not until June 1949, after the charges in this proceeding had been filed, that the Union officials were shown for the first time a copy of the "Return-to-Work Policy" (R. 36; 128, 335-336).

The Union, however, was not unaware that respondent was maintaining a policy according to which employees who had worked during the strike were given preferential treatment at variance with the seniority provisions of the Master Agreement (R. 37; 109-110, 279-281). Notice to that effect, at least in a general way, was brought home to the Union shortly after the termination of the strike when railroad department employees were returning to work (*ibid.*).⁴

Respondent contended that the "Return-to-Work Policy" was not only in accordance with, and provided for, by

⁴Prior to June 1949, when it was given a copy of a proposed agreement authorizing the Return to Work Policy, the Union apparently did not have any definite knowledge of the policy. Thus Frank Gordon, one of the Union's representatives, testified (R. 148):

This, in general, is about what during a long period of time the Union surmised that it might be, a policy similar to this, but there has absolutely never been a different statement made to the Union at any time as to exactly what the Company's policy was. There was hints and threats and everything else but never at any time did they come right out and say what the

the strike settlement agreement but was sanctioned by a collateral oral agreement with the Union representatives entered into while the strike settlement agreement was being negotiated. To support its claim as to the existence of such a collateral oral agreement, respondent relied upon the following facts:

During the settlement negotiations, various drafts of a proposed settlement agreement had been prepared (R. 47; 264). On October 10, the Union negotiators submitted a draft in the precise form later initialed by the parties, except for one clause (R. 47; 265). There was added to the provision that the former employees were "to return to work without discrimination," the clause "and without loss of seniority" (*ibid.*). The insertion of that clause met with objection from respondent's negotiators (*ibid.*). They were then principally concerned with protecting men already at work in particular jobs against being displaced from such jobs by returning strikers (R. 47; 285). Respondent's negotiators protested that the insertion of the clause referring to seniority would not at the conclusion of the strike protect employees already working against displacement by returning strikers in the particular jobs they were then holding (R. 48; 265, 285-287). The Union negotiators, declining to accede to any relinquishment of its striking members' seniority rights, strongly opposed respondent's position (R. 48; 305). After some lengthy discussion of this issue, at which no agreement was reached, the Union negotiators retired from the meeting room to consider the matter privately (R. 48; 265, 286, 305). They returned with the words, "and without loss

Company policy was and they kept the Union in doubt at all times.

Gordon further testified that the policy which the Union suspected the Company of following, was not followed in all cases (R. 147).

of seniority" stricken from the draft (*ibid.*). Asked by respondent's representatives why they had deleted the phrase, the Union negotiators replied that it was going to be difficult enough to persuade the Union membership to accept a strike settlement involving no gain to the strikers, without further complicating settlement by any reference to seniority (R. 48-49; 266). Respondent's negotiators made no response, except to say, "Maybe that is all right too," and to add that it probably was a matter of no importance anyway since it could not affect anyone until a serious curtailment took place, and no such curtailment was in prospect at that time (R. 48-49; 268).

Respondent's Assistant General Manager, Lauschel, testified that he "assumed" the Union's negotiators had agreed to "strike seniority;" and that his "assumption" was based entirely upon their conduct in striking "and without loss of seniority" from the draft (R. 49-50; 274, 289). He admitted, however, that at no time during the course of the negotiations, or thereafter, had the Union negotiators expressed in words their agreement with respondent's position on "strike seniority" (*ibid.*). Asked by respondent's counsel why, if there was such an agreement, no affirmative mention was made of it in the memorandum, Lauschel replied (R. 50; 266):

They [the Union's negotiators] didn't want it in there. . . . Beause they said they couldn't sell that type of a thing to their membership, they would rather not have anything said about seniority to complicate the settlement of the strike, and get the men back to work.

He further testified that until the memorandum was dated and initialed on October 12, 1947, he had regarded it simply as a proposal for a settlement, but that, once initialed, he regarded it no longer as a proposal, but

as a strike settlement agreement embodying the full understanding of the parties (R. 50; 288-289). That too, was the view of the Union (R. 50; 319).

4. The negotiations in the Spring of 1948

In the Spring of 1948, negotiations were begun for the execution of a new Master Agreement (R. 39; 112). No issue was raised during the negotiations with regard to the seniority provisions of the former contract (R. 39; 116). After the negotiations had resulted in an agreement upon all points in issue a "recommended" agreement dated April 13, 1948, was signed by the negotiating parties detailing the agreed modifications and amendments and interpretations to the former contract (R. 39; 112). In accordance with the usual practice, the agreement of April 13, 1948, was then submitted to the Union membership, and was ratified (R. 39; 114). It was understood that after ratification a new Master Agreement was to be drawn by respondent to include the provisions of the last one, as modified by the various written memoranda of agreement that had been signed since (R. 39; 113-115). When the new Master Agreement was typed by respondent, it included a clause reading, "The strike settlement of October 12, 1947, shall control the application of the seniority article" (R. 39; 115-116). Taking the position that no mention had been made in the negotiations concerning this clause, the Union refused to sign the Master Agreement in that form (*ibid.*). But although no Master Agreement was signed, the record is clear, and the Board found contrary to the position of the respondent's counsel, that the last Master Agreement, as modified by the several agreements hereinabove referred to, was in fact extended in its operative effect until April 1, 1949

(R. 39-40).⁵

B. The layoffs of Cloninger and Walters

Pursuant to its strike seniority policy, respondent laid off, among other employees, the two in whose behalf Local 10-364 filed charges in this case.

One of the two, Gail Cloninger, had remained on strike until October 13, 1947, the strike termination date (R. 40; 157). Upon returning to work, he was assigned to common labor, working as a truck driver's helper on the carpenter's crew in the maintenance department, the very job on which he had been working immediately before the strike (R. 40-41; 155-156, 162-163, 168). On December 30, 1948, when respondent found it necessary to curtail operations, a number of employees, including Cloninger, were laid off from their jobs in the maintenance department (R. 41; 157-159). Cloninger was replaced in his job as truck driver's helper by an employee Cox who had returned to work during the course of the strike and was working in the carpenter's crew of the maintenance department as a common laborer when Cloninger was laid off (R. 41; 167).

After receiving his layoff notice, Cloninger, in accordance with respondent's usual practice, was referred to the employment office for possible reassignment (R. 42-43; 163-164). He was then offered another job in a different department which paid the same rate which Cloninger had been receiving (R. 43; 164, 166). He accepted the new assignment after unsuccessfully processing a grievance in regard to his layoff; and before the hearing in this case,

⁵This is established by the following: (1) The record clearly shows that the parties dealt with each other on that basis (R. 40; 118-120); (2) Charles J. Commerford, Clearwater's personnel director until July 1, 1949, so testified (R. 40; 227); (3) The Master Agreement provides for 60 days' notice prior to the April 1 expiration date of a change of terms (R. 40; G. C. Ex. 2).

he was reassigned to his old job in the maintenance department (R. 43; 165-167, 254).

Although Cloninger was a shop steward of the Union (R. 166), he did not know about respondent's strike seniority policy and had never even heard rumors about it until approximately a month before receiving his layoff notice (R. 168). He first learned of the precise nature of the policy only after his layoff and in connection with processing the grievance in regard to it (R. 158-159, 167-168).

Respondent concedes that under its pre-strike interpretation of the applicable seniority provisions, Cloninger's seniority, both in the maintenance department and in the plant, would have been considered greater than that of Cox; that Cloninger would have had prior retention rights in the department upon a curtailment of operations; and that he could not have been replaced by Cox in a situation such as this (R. 41; 225-226). The reason Cox was retained in the department in preference to Cloninger, according to the testimony of Clearwater Personnel Director William Green, was that Cox had returned to work while the strike was in progress and, on the basis of respondent's post-strike seniority interpretations, was consequently entitled to "strike seniority" (R. 41; Tr. 199).

Claude A. Walters, the other employee in whose behalf Local 10-364 filed charges, was also classified as a common laborer (R. 43; 171). Like Cloninger, he remained out during the entire period of the strike and

On January 28, 1949, respondent notified the Union of its desire "to negotiate a written agreement based on the Master Agreement effective April 1, 1946, as modified by the subsequent agreements of May 7 and 28, 1947, October 12, 1947, and April 13, 1948, incorporating in one agreement the various interpretations, clarifications, and amendments which have never been combined in a single signed agreement" (R. 40; 122, G. C. Exh. 9).

returned to work on October 13 when the strike was called off (*ibid.*). Upon his return, he was given his former job in the unstacker department and remained there until January 18, 1949, when, as a result of a curtailment of operations, it became necessary for respondent to lay off some employees (R. 43; 171-172, 189-190, G. C. Exh. 12. On that date Walters was laid off, and another employee, Slater, also classified as a common laborer, was retained and given a clean-up job to which Walters would have been entitled had his seniority been figured on the pre-strike basis (R. 44; 225-226, G. C. Exh. 12, pp. 56-59).⁶ Respondent concedes that the reason for retaining Slater while laying off Walters, was that Slater, unlike Walters, had "strike seniority," Slater having returned to work before the termination of the strike (R. 44; 189-190, Tr. 198, G. C. Exh. 12).

In giving Walters his layoff notice, his foreman informed him that he would have retained his job in the department had he come back to work only 1 day during the strike, and that "on account of the strike" he could not "bump" other men whom he otherwise would have been entitled to "bump" (R. 43; 172-173). Walters, apparently unable to understand the basis upon which he had been selected for layoff, asked the Union's International Representative, Gordon, for an explanation (R. 45; 92, 186). Gordon, after first consulting respondent's personnel director about Walters, decided not to advise Walters to file a grievance but, instead, to add Walters' name to the unfair labor practice charge then being prepared (R. 45; 152, 186).

⁶Between the date of Walters' layoff from the unstacker department and his acceptance of another job in the dock department on March 10, 1949, respondent offered him several other jobs which he declined for personal reasons (R. 44-45; G. C. Exh. 12). On March 21, 1949, he was reassigned to the unstacker department (R. 45; G. C. Exh. 12).

C. Respondent's Special Defenses

In addition to contending that it was warranted in giving layoff notices to Cloninger and Walters because the Union had agreed to the strike seniority policy pursuant to which the layoffs were made, respondent pleaded two special defenses. It urged first, that the proceedings were barred by the proviso to Section 10 (b) of the Act, which states that no complaint shall issue based upon unfair labor practices occurring more than 6 months prior to the filing and serving of charges, and secondly, that the Board was without authority to proceed in the premises by virtue of the provisions of Section 9 (f), (g), and (h) (R. 17, 19, 336-337).

In respect to the first of these special defenses, the fact is that the charge initiating the proceedings before the Board⁷ was filed more than six months after respondent's inauguration of its strike seniority policy but less than six months after the layoffs of Cloninger and Walters in accordance therewith and less than six months after they or either of them had any notice of that policy (see *supra*, pp. 7, 14, 15).

In respect to the second defense, the record shows that both the International Woodworkers of America and Local 10-364, the labor organization which filed the charge initiating the proceedings before the Board,⁸ were in compliance with Section 9 (f), (g), and (h) at the time the complaint issued but two of the local unions of the Inter-

⁷Cloninger and Walters received their layoff notices on December 30, 1948 and January 18, 1949, respectively (R. 41, 43). The initial charge was filed on February 16, 1949, and served on February 17, 1949 (G. C. Exh. 1-A, 1-B). An amended charge was filed on March 18, 1949 and served on March 21, 1949 (G. C. Exh. 1-C, 1-D).

⁸The charge was filed by "International Woodworkers of America, Local 10-364" and was signed "A. F. Hartung, International Vice President" (G. C. Exh. 1-D).

national Woodworkers of America which were parties to the Master Agreement were not then in compliance with that section (R. 85).

D. The Board's Conclusions

The Board overruled respondent's special defenses (R. 26), and held that the Union had not agreed to respondent's strike seniority policy (R. 52-53) and that respondent, by maintaining such policy, "more specifically by applying and giving effect to it in the layoffs of Cloninger and Walters," had engaged in unfair labor practices within the meaning of Section 8 (a) (3) and (1) of the Act (R. 64-65). The Board concluded, however, upon the facts set forth *supra*, pp. 13, 15, that since Cloninger and Walters, after being discriminatorily laid off from their respective departments, were offered jobs in other departments and were later restored to the jobs held by them before their discriminatory layoffs, neither a reinstatement nor back-pay order was appropriate to remedy the unfair labor practice (R. 63-64). But, it appearing from the record that respondent was continuing to maintain its discriminatory policy and that employees in addition to Cloninger and Walters would likely suffer similar discriminations upon future curtailment of respondent's operations, the Board concluded that it could appropriately remedy the unfair labor practice only by requiring respondent to cease and desist from continuing to maintain or give effect to the policy (R. 64).

II. The Board's Order

The Board's order requires respondent to cease and desist from (a) maintaining or giving effect to any seniority or layoff policy which discriminates against any of its employees with regard to the order in which they are to be selected for layoff, or with respect to any aspect of their

employment relationship, on the basis of whether they had or had not engaged in a strike or concerted activities or on the basis of the period during which they had engaged in such strike or concerted activities; and from discouraging membership in Local 10-364, C. I. O. or its parent organization, International Woodworkers of America, C. I. O., or any other labor organization of its employees, by in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of employment (R. 80). The order also requires respondent to post the customary notices at its Clearwater plant at Lewiston, Idaho (R. 81).

SUMMARY OF ARGUMENT

1. By treating as new employees, for layoff purposes, those economic strikers who at the termination of the strike were reinstated to the jobs they formerly held, and laying off such employees prior to others who were hired or returned to work during the course of the strike, respondent discriminated against such employees in violation of Section 8 (a) (3) and (1) of the Act. The Board's finding that the bargaining representative did not agree to the policy pursuant to which such discrimination took place and, on the contrary, was operating under agreements with respondent which protected the seniority rights of all the employees, is supported by substantial evidence.

Respondent may not avoid responsibility for the maintenance and application of its discriminatory strike seniority policy on the theory that the employees here involved were only partially reinstated upon their return to work at the conclusion of the strike. The fact that they belonged to the common labor pool within their respective departments and were not entitled to any specific jobs does not give other common laborers who were hired or returned to work before the termination of the strike any superior

claim to common labor jobs upon a reduction in force.

2. The complaint in this proceeding is not barred by the limitations proviso to Section 10 (b) of the amended Act which states that no complaint shall issue based upon unfair labor practices occurring more than 6 months prior to the filing and serving of the charges. The layoffs of employees Cloninger and Walters, constituting the unfair labor practices here involved, occurred less than 6 months prior to the filing and serving of the charges.

In the first place, the record shows that respondent withheld and the employees did not have knowledge of the promulgation of the policy until within the limitation period. It is difficult, therefore, to see how respondent's conduct in the abstract, prior to the time the employees knew of it, could constitute a violation of Section 8 (a) (3) of the amended Act, as to which a charge should have been filed, since it could be argued that such undisclosed conduct could not reasonably tend "to discourage membership in a labor organization" within the meaning of that section. In the second place, even if the employees did know of the policy prior to the 6-month period, the limitations proviso to Section 10 (b) would not be applicable because it was not the inauguration of the policy but the maintenance of it during the 6-month period and the application of it to the two employees here involved which the Board found to be an unfair labor practice.

3. Since the local which filed the charges in this proceeding and the international union with which it is affiliated were in compliance with the financial statement and non-Communist affidavit filing requirements of Section 9 (f), (g) and (h) of the amended Act when the complaint was issued, it is immaterial that other locals which, together with the charging local, constituted the

appropriate bargaining unit may not then have been in compliance.

ARGUMENT

The board properly found that respondent violated Section 8 (a) (3) and (1) of the amended Act by applying to employees Cloninger and Walters a layoff policy which discriminated against them because they had remained on strike until the strike termination date

Respondent concedes that employees Cloninger and Walters, for layoff purposes, were considered as new employees when reinstated upon the termination of the strike, and that they would not have been laid off from their respective departments had they returned to work before the termination of the strike (*supra*, pp. 14-15). This fact, without more, warranted the Board in finding that respondent discriminated in regard to their tenure of employment and interfered with their right to engage in concerted strike activity, in violation of Section 8 (a) (3) and (1) of the amended Act.

It is well settled that under Section 2 (3) of the amended Act, which defines the term "employee" to "include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute," an economic striker remains an employee within the meaning of the Act and must be reinstated by his employer upon the termination of the strike if there is a vacant place which he can fill. *N. L. R. B. v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345-347. Failure thus to reinstate him or discrimination against him in any other way because he has engaged in a protected union or concerted activity is a violation of Section 8 (a) (3) and (1) (*id.*).

Although conceding the commission of the very acts which constitute the unfair labor practice, respondent seeks to defend its action by arguing (1) that the seniority of

which Cloninger and Walters were deprived does not exist as a right in the absence of a contract providing for it and that the Union agreed to and acquiesced in the seniority policy pursuant to which respondent effected the layoffs (R. 71-75), and (2) that respondent did not, in any event, discriminate against Cloninger and Walters because there were no specific jobs at the end of the strike to which Cloninger and Walters were entitled to be reinstated; that they were common laborers, belonging to a common labor pool within their respective departments; that the filling during the strike of any common labor jobs in a given department operated as a partial displacement of all in that department's common labor pool who remained out on strike; and that strikers such as Cloninger and Walters were entitled only to "partial reinstatement," a qualified form of reinstatement which restored to them all their former job rights except the right which might otherwise flow from their seniority to displace upon a future reduction in force those employees who, during the course of the strike, had already "partially" displaced them (R. 76). The Board properly rejected both these defenses (R. 55-60).

A. Respondent's contentions regarding seniority

It is true, as respondent asserts, that the Act does not create seniority rights or guarantee such rights to employees and that those rights in organized industries are usually created by contract between the employer and bargaining representative. *Aeronautical Lodge v. Campbell*, 337 U. S. 521. The point, however, is that if the employer does grant seniority rights, he may not discriminate against employees in conferring those rights on the basis of whether or not they have engaged in a strike or other union or concerted activity protected by the statute. *N. L. R. B. v. Walt Disney Products*, 146 F. 2d 44, 47

(C. A. 9), certiorari denied, 324 U. S. 877; *N. L. R. B. v. Star Publishing Co.*, 97 F. 2d 465, 468, 470 (C. A. 9); *N. L. R. B. v. Sandy Hill Iron and Brass Works*, 165 F. 2d 660, 662 (C. A. 2); *Polish National Alliance v. N. L. R. B.*, 136 F. 2d 175, 181 (C. A. 7), affirmed 322 U. S. 643. The discrimination against which Section 8 (a) (3) protects employees embraces "all elements of the employment relationship which in fact customarily attend employment and with respect to which an employer's discrimination may as readily be the means of interfering with employees' right of self-organization as if these elements were precise terms of a written contract of employment." *N. L. R. B. v. Waterman S. S. Corp.*, 309 U. S. 206, 218. And, as was pointed out in *N. L. R. B. v. Republic Steel Corp.*, 114 F. 2d 820, 821 (C. A. 3), striking employees, upon reinstatement, are entitled to be "treated in all matters involving seniority and continuity of employment as though they had not been absent from work." Consequently, regardless of the method by which respondent seeks to accomplish the result, it may not lawfully select its employees for layoff solely or even partly because they have engaged in a strike whereas the retained employees have not.

Whether or not the bargaining representative of employees may lawfully, in behalf of the employees, waive their right to insist upon the statutory guarantee against discriminatory treatment is a question which the Board found unnecessary to pass upon in this case⁹ for the Board found that the Union had not waived such right (R. 59-60).

The Board's finding in this respect is supported by sub-

⁹See *McQuay-Norris Mfg. Co. v. N.L.R.B.*, 116 F. 2d 748, 750-751 (C.A. 7), certiorari denied, 313 U. S. 565; cf. *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U. S. 678, 697; cf. *Briggs Indiana Corp.*, 63 NLRB 1270, 1272.

stantial evidence. As shown *supra*, pp. 4-5, at the time the strike was called, there was in effect an agreement between respondent and the Union which provided for seniority of all employees on a job, departmental and plant basis. The strike settlement agreement provided that the strikers should return to work "without discrimination" and that the "present contract" would "remain in effect without change" except for a maintenance of membership provision not here material. It was submitted to and voted upon by the Union membership as a condition upon which they were willing to return to work. Attempts by respondent thereafter to lay off employees on a basis different from that provided in the strike settlement agreement were protested by the Union as a breach by respondent of the existing agreements with the Union. The Union was never even shown a copy of respondent's "Return to Work Policy," the substance of which respondent claims was agreed to by the Union, until after the charges in this proceeding were filed.

Moreover, the same provisions regarding seniority which were provided in the Master Agreement in effect when the strike commenced were thereafter included in the April 1948 "recommended agreement" (incorporating modifications, amendments and interpretations of the former agreements) which was signed by the negotiators and approved by the Union membership (*supra*, p. 12). And although this recommended agreement was never incorporated into a new Master Agreement as contemplated by the parties, the last Master Agreement, with the modifications, amendments and interpretations set forth in the "recommended agreement," was in fact extended in its operative effect until April 1, 1949, subsequent to the layoffs of Cloninger and Walters (*supra*, p. 12).

Respondent's attempt to show that the Union had agreed to a strike seniority policy which, for layoff purposes, treat-

ed as new employees those strikers who did not return to work until the strike was terminated would as the Board found (R. 50-51), "patently vary and contradict the unambiguous terms of the strike settlement agreement of October 12, 1947." Accordingly, the Board found (R. 51) that "the parol evidence rule—which has as its basis the assumed intention of parties who have evidenced their understanding by a written document to place themselves beyond the uncertainties of extrinsic evidence—is applicable and controlling in this situation." We submit that the finding is in accord with a wealth of authority, including this Court, and is dispositive of respondent's contention that the Union agreed to the strike seniority policy. *Helvering v. Coleman-Gilbert*, 296 U. S. 369, 374; *Grace Brothers v. Commissioner*, 173 F. 2d 170, 175 (C. A. 9); *Titus v. United States*, 150 F. 2d 508, 511 (C.A. 9); *Jurs v. Commissioner*, 147 F. 2d 805, 810 (C. A. 9); *Pugh v. Commissioner*, 49 F. 2d 76, 79 (C.A. 5), certiorari denied 284 U.S. 642; 9 *Wigmore on Evidence* (3d ed. 1940), secs. 2425, 2446; Hughes, *Law of Evidence* (1907 ed.), sec. 40.

But, as the Board further pointed out (R. 52-53), respondent's contention must also be rejected for the further reason that even if it were permissible to inquire into the negotiations leading up to the strike settlement agreement in order to vary the terms of that agreement, the record of such negotiations does not support the claim that the written memorandum embodying the settlement expressed only a part of such agreement, or that there was a supplementary, verbal understanding providing for the strike seniority. In support of its position, respondent asserts that during the strike settlement negotiations, the Union, on October 10, submitted a draft which provided that all striking employees should return to work "without discrimination" and "without loss of seniority" and that the latter clause was later dropped from the final agree-

ment (R. 73-75). As shown *supra*, pp. 10-11, respondent's negotiators objected to the inclusion of the latter clause on the ground that it would not, at the conclusion of the strike, protect those who had been placed in jobs formerly occupied by employees who were still on strike. The question of protecting the jobs of replacements in the event of a future reduction in force, if raised at all, was mentioned only incidentally. After lengthy discussion, the Union negotiators retired to discuss the matter privately. They decided to agree to delete the clause relating to seniority since they concluded that it conflicted in a sense with another provision of the draft providing that returning strikers were not to be reinstated if the jobs formerly held by them had been filled. A second reason for their capitulation was that except for cases in which a striker had been replaced, seniority rights would be fully protected because of the provision in the settlement agreement extending the existing collective bargaining agreement. The Union negotiators thereupon returned to the meeting and announced their willingness to delete the seniority clause. The reason given to respondent's negotiators for such willingness was that complication of the settlement by reference to seniority would create additional difficulties in obtaining ratification by the Union membership. The sole response of respondents' negotiators was that the matter was probably of no importance since it could not affect anyone until a serious curtailment took place and that no such curtailment was in prospect at that time.

The memorandum of settlement, with the deletion noted above, was submitted to and ratified by the membership of the locals affiliated with the International on October 11, 1947. The following day it was initialed by representatives of respondent and of the Union. As was conceded by one of respondent's negotiators, at no time during the

course of the negotiations or thereafter did the Union negotiators even orally express their agreement to respondent's strike seniority policy.¹⁰ In addition, the same negotiator testified that after the draft had been initialed, he regarded it as a strike settlement agreement embodying the full understanding of the parties (R. 50; 288).

We submit that the Board correctly concluded that respondent is precluded from attempting to show that the settlement agreement did not represent its whole agreement with the Union and that in any event, the Board's finding that the record does not support respondent's contention that the Union agreed to strike seniority is supported by substantial evidence. *N. L. R. B. v. Nevada Consolidated Copper Corp.*, 316 U. S. 105; *N. L. R. B. v. Reeves Rubber Co.*, 153 F. 2d 340, 342 (C. A. 9).

B. Respondent's partial reinstatement theory

Respondent's final argument is that it did not violate the Act in selecting Cloninger and Walters for layoff because those employees, being a part of the common labor pool in their respective departments, had been only partially reinstated at the end of the strike, their places having been partially filled by other employees in the common labor pool who were hired or returned to work before the strike termination date. This argument, as the Board found (R. 55-56), is "based upon premises, not only inconsistent with the terms of the strike settlement agreement, and otherwise false in fact, but unsupportable in law."

In the first place, the strike settlement agreement makes

¹⁰It may be noted that if the negotiators for the respective parties tacitly joined to conceal from the Union membership a secret collateral understanding, such understanding would not be binding upon the Union. 9 *Wigmore on Evidence* (3d ed. 1940), sec. 2463.

no reference, either expressly or by implication, to "partial reinstatement" of strikers for whom there was available work. On the contrary, the agreement explicitly provides for the return of such strikers "without discrimination" and for the protection of their "job rights" (*supra*, p. 6).

In the second place, Cloninger and Walters, at the conclusion of the strike, were reinstated to the precise jobs within the common labor pool in their respective departments at which they were working when they went on strike (*supra*, pp. 13, 14). Moreover, at the time Cloninger was laid off from his department, he was replaced by Cox who, upon returning to work during the strike, was placed in another department and did not reenter Cloninger's department until some time after Cloninger's return (R. 56-57, n. 15; 189-190, G. C. Exh. 12). Consequently, even if Cloninger had not been reinstated to his precise old job, Cox, upon his return to work during the strike, could not have replaced Cloninger, even partially. Moreover, as the Board pointed out (R. 56, n. 15), "Though common labor in each department be considered a pool, the pool presumably was no larger upon their [Cloninger's and Walters'] return than when they left on strike."¹¹ Even more difficult to follow is the claim that they were replaced by employees who had worked at their sides before the strike, but who, although they had gone on strike, had chosen to return to work before the strike's termination date. Whether or not an employee has been replaced is to be tested not by whether someone else has performed his work during his absence on strike, but by whether a vacancy exists for him to his former job at the time he

¹¹On October 10, just prior to the termination of the strike, there were working in respondent's employ about two-thirds as many employees as had been working at the commencement of the strike (R. 31; 262-263).

elects to abandon the strike and to return to work.”

Finally, in holding respondent's position unsupportable in law, the Board correctly stated (R. 57):

N. L. R. B. v. Mackay Radio Telegraph Company, 304 U. S. 333, does not, as the Respondent suggests, support its position in that regard; rather it refutes it. The holding in that case—that an employer “is not bound to discharge those hired to fill the places of [economic] strikers upon the election of the latter to resume their employment in order to create places for them”—is based upon the proposition that no discrimination may be found in an employer's refusal to restore to work economic strikers for whom vacancies no longer are open because the employer, with the non-discriminatory object of continuing his business, has replaced the strikers during their voluntary absence on strike. But where, as in this case, places are in fact available for the returning strikers, and they are actually restored to their former jobs at the termination of the strike, the *Mackay Radio* doctrine cannot be construed to justify as non-discriminatory their “partial reinstatement,” as that term is used by the Respondent. For, as the Supreme Court expressly recognized in the *Mackay Radio* case, strikers during the course of a strike retain their status as employees under Section 2 (3) of the Act, and, if places are available upon their election to return, any discrimination in putting them back to work is prohibited by Section 8. The controlling rule was recently restated by the Board in *Matter of General Electric Company*, 80 NLRB, No. 80, as follows: “. . . except to the extent that a striker may be replaced during an economic strike, his employment relationship can-

not otherwise be severed or impaired because of his strike activity."

II

The complaint does not fall within the 6 months limitations proviso to Section 10 (b) of the Act

Respondent contends that the unfair labor practices alleged in the complaint are barred by the limitations proviso to Section 10 (b) of the Act which provides that no complaint shall issue based upon unfair labor practices occurring more than six months prior to the filing and serving of charges (R. 350). It asserts that although the charges were filed and served within six months of the lay-offs of Cloninger and Walters, they were not filed and served within six months after respondent inaugurated its discriminatory seniority policy pursuant to which the lay-offs took place. Respondent argues that the limitation period should begin to run from the date the policy was inaugurated. The Board, we believe, properly rejected this contention.

In the first place, by asserting that the date upon which it established the discriminatory policy is the controlling date, respondent seeks to profit from its own failure to disclose to its employees the nature of such policy. Thus, respondent, although contending that the policy was agreed to by the union negotiators at the time of the submission of the strike settlement agreement to the union membership for approval, asserts that the strike seniority policy was not incorporated in the settlement agreement because of a realization that the union members might refuse to ratify the agreement and return to work if they knew of respondent's strike seniority policy (R. 256; *supra*, pp. 10-11). Respondent knew, moreover, that the union members, in voting to accept the strike settlement agreement, which provided that they should return to work with-

out discrimination and that the current contract should remain in effect, would naturally expect to operate under the seniority provisions of that contract. It also knew that the union negotiators thereafter, in connection with some railroad department employee grievances, refused to recognize the existence of any seniority agreement which would discriminate against strikers (R. 37, 61; 110-111, 137, 281). Respondent nevertheless failed to announce its strike seniority policy to its employees, post notices of it on its bulletin boards or in any other way inform the employees generally of its policy (*supra*, p. 9). Even during the 1948 negotiations for a new contract, respondent made no mention of its strike seniority policy and the "recommended agreement," signed by the negotiators for respondent and for the Union and ratified by the union membership, made no mention of such a policy (*supra*, p. 12). It is not surprising, therefore, that Cloninger, although a union steward, had never heard of the policy until about a month prior to his lay-off and that Walters apparently did not know of it until after receiving his lay-off notice (*supra*, pp. 14, 15).

In these circumstances respondent is in effect arguing that the only valid cause of action open to cognizance by the Board occurred at the time when respondent formulated the new seniority policy, even though the employees themselves were not made aware and did not know of the change in policy. The premise underlying respondent's contention is that its mere promulgation of the discriminatory seniority policy at the end of the strike was a violation of Section 8 (a) (3) as to which the employees were required promptly to file charges with the Board, even though its conduct was not known to the employees. The Board, of course, did not pass upon the question whether the unpublished promulgation was itself a violation since the issue before it was not the

legal effect of the respondent's conduct at the time that it inaugurated the seniority policy, but of its later action in laying off two employees pursuant to the discriminatory policy thus inaugurated. It is difficult to see how respondent's conduct in the abstract, unknown to the employees, could constitute a violation of Section 8 (a) (3) of the amended Act since it could be argued that such undisclosed conduct could not reasonably tend "to discourage membership in a labor organization" within the meaning of that section.

But regardless of whether the employees generally or Cloninger and Walters in particular knew of respondent's strike seniority policy prior to the six months limitation period, the Board believes it was nevertheless proper to issue the complaint in this case. As already pointed out, the Board did not find that respondent engaged in an unfair labor practice by inaugurating its discriminatory policy. It found rather that respondent had violated the Act "by continuing to maintain it; more specifically by applying and giving effect to it in the lay-offs of Cloninger and Walters" (R. 60).¹²

It did not, moreover, base its decision in this case upon employer conduct occurring prior to the 6 months period preceding the filing and serving of charges but considered such conduct, as it has done in other cases,¹³ as back-

¹²At the commencement of the hearing, the General Counsel announced that despite a broader allegation in the complaint, an unfair labor practice finding was being sought only with respect to respondent's conduct in maintaining and giving effect to the discriminatory policy within the 6-month period preceding the filing and serving of the charge (R. 60; 88).

¹³See, e.g., *Sun Oil Co.*, 89 NLRB, No. 104, *Florida Telephone Co.*, 88 NLRB, No. 251, and *Axelson Mfg. Co.*, 88 NLRB, No. 155, in which the Board considered employer conduct prior to the 6 months period as background and to throw light on employer conduct within that period which was found to be in violation

ground and "merely for the purpose of bringing into clearer focus the conduct in issue" (R. 60-61). The Board made it plain that "Even without such consideration, however, the allegations of discrimination would have been found amply supported by such undisputed record facts as bear directly upon the lay-offs of Cloninger and Walters" (R. 61). Thus Cloninger, in protesting his lay-off notice, was informed by respondent that because he had remained away from work during the entire period of the strike, his seniority for lay-off purposes started anew when he returned to work after the strike and that this was in accordance with respondent's policy (R. 158-161, 167-168); and Walters, when he asked why he was being laid off, was informed by respondent that if he had returned to work just one day during the strike, he would not have been laid off and that "on account of the strike" he was being laid off before the other employees (*supra*, p. 15).

It is the selection of Cloninger and Walters for lay-off because they had remained on strike until the strike termination date which is the gist of the unfair labor practice here litigated. That the discrimination against them was

of Section 8 (a) (2); *Shields Engineering & Mfg. Co.*, 85 NLRB 169, in which the Board considered employer conduct prior to the 6 months period in evaluating evidence regarding conduct within that period found to be in violation of Section 8 (1) and (3); and *Luzerne Hide & Tallow Co.*, 89 NLRB, No. 119, in which the Board considered evidence that a strike was caused and prolonged by unfair labor practices which occurred more than 6 months before the charge alleging discrimination in reinstatement of strikers was filed, the discrimination having occurred within the 6 month period. Cf. *Superior Engraving Co. v. N.L.R.B.*, (C.A. 7), decided June 27, 1950, 26 LRRM 2351, in which the Court, although disagreeing with the Board's construction of Section 10 (b), nevertheless enforced the Board's order on the theory that certain unfair labor practices commencing prior to what the Court thought to be the protected limitation period continued during the protected period.

pursuant to a policy, rather than an isolated act, is relevant to show that respondent is likely to discriminate against them again in the future as well as to discriminate against other employees who similarly exercised their statutory right to engage in union and other concerted activities. This fact therefore was appropriately considered in devising an effective remedy.

It makes no difference that respondent's original act of promulgating the strike seniority policy (at least when made known to the employees) might also be considered a violation of Section 8 (a) (3).¹⁴ Respondent's whole conduct or any part of it might separately be considered violative of the Act. Respondent's original act subjected the strikers to the hazard of a lay-off, but this does not mean that any of the strikers would necessarily thereafter be laid off. Respondent could always repent and change its policy and, in any event, the necessity for lay-off of any of the strikers could not be certain to arise. The lay-offs, therefore, are discriminatory acts which tend to discourage union membership when they occur and it makes no difference whether they be considered as new and independent unfair labor practices¹⁵ or merely as applications of an old but unlawful policy violative of the Act.¹⁶

¹⁴See *General Electric Company*, 80 NLRB 510.

¹⁵Cf. *Brown v. Elliott*, 225 U.S. 392, 400-401; *Lonabaugh v. United States*, 179 F. 476, 478 (C.A. 8), conspiracy cases in which, although prosecution for the original act of conspiracy was barred, each overt act committed pursuant to the conspiracy and occurring within the limitation period was held not barred.

¹⁶Cf. also *N.L.R.B. v. Superior Engraving Co.*, (C.A. 7), decided June 27, 1950, 26 LRRM 2351, holding that a continuing refusal to bargain during the limitation period is not excused by the union's lack of majority status during that period since the loss of majority status was caused by the employer's refusal to bargain prior to the limitation period, when the union had actually been chosen by a majority, and holding also that a

III

The filing requirements of Section 9 (f), (g) and (h) of the Act have been fulfilled

As a further ground for dismissing the complaint, the respondent has contended that the requirements of Section 9 (f), (g) and (h) of the amended Act have not been fully complied with (R. 350-351). That section provides that no complaint shall be issued pursuant to any charge filed by a labor organization unless the financial statement and non-Communist affidavit filing requirements contained in that section have been satisfied by such labor organization and by "any national or international labor organization of which it is an affiliate or constituent unit."

The record shows without contradiction that at the time the complaint was issued, Local 10-364, the charging party, as well as the International Woodworkers of America, with which the charging party is affiliated, were in compliance with such filing requirements (R. 24; 85). Respondent, however, has attempted to read into Section 9 (f), (g) and (h) a requirement which neither the literal language nor the purpose of that section demand. Respondent has pointed out that it has a number of operations in scat-

unilateral grant of wage increases prior to the limitation period continued in effect within the limitation period and was therefore a continuing unfair labor practice; *United States v. Guertler*, 147 F. 2d 796, 797 (C.A. 2), certiorari denied, 325 U. S. 879, holding that the statute of limitations applying to the offense of failing to keep the selective service board informed of the registrant's address did not begin to run during the continuous failure to notify the selective service board; and *Urie v. Thompson*, 337 U. S. 163, where it was held that in cases involving occupational diseases arising under the Federal's Employers' Liability Act, the limitation period does not begin until the injured person knew or should have known he had contracted the occupational disease. See also, "Developments in the Law - Statute of Limitations", 63 Harvard Law Review 1177, 1205.

tered localities; that the production and maintenance employees in these operations are included in a single, company-wide bargaining unit with the International as the certified bargaining representative for that unit; that the International has affiliated with it four locals, including the charging local which encompass within their membership employees in such unit; that these locals jointly with the International have been parties to collective bargaining agreements with respondent covering employees in the bargaining unit; and that two of these four locals were not in compliance with the filing requirements of Section 9 (f), (g) and (h) at the time the complaint was issued (R. 19-20,, 85, 89-92).¹⁷ Respondent argues that since this proceeding basically involves the validity of its strike seniority policy as applied throughout the bargaining unit, it is a prerequisite to invocation of the Board's processes that all constituent locals with membership among the employees in the unit be in compliance. It asserts, therefore, that the local which filed the charges in this proceeding, and to which Cloninger and Walters and other employees of respondent's Clearwater plant in Lewiston, Idaho, belong, was acting as a front for the other three locals, two of which were not in compliance with the statutory filing requirements.

In arguing thus, respondent fails to differentiate between a proceeding in which, as here, discrimination against employees is involved, and a proceeding seeking merely to establish or otherwise aid the bargaining position of a labor organization, such as a proceeding for certification of a non-complying union as a collective bargaining representative or a proceeding to compel an employer to bargain with

¹⁷The Board's records show, however, that even the two locals not then in compliance subsequently complied with the statutory requirements.

a noncomplying union. In the latter category of cases, noncompliance would certainly justify an administrative refusal to proceed even though the charge was filed by an individual or a complying union and the Board has so held. *Campbell Soup Company*, 76 NLRB 950; *Oppenheim Collins & Co.*, 79 NLRB 435; *Augusta Chemical Co.*, 83 NLRB 53. Indeed, shortly after the effective date of the amended Act, when there came before the Board cases involving a refusal by employers to bargain, the Board conditioned its bargaining orders upon compliance by the union with the filing requirements within 30 days after issuance of the Board's order, even though the complaint had been properly issued prior to the enactment of Section 9 (f), (g) and (h). *Inland Steel Co. v. N. L. R. B.*, 170 F. 2d 247 (C. A. 7), certiorari denied 336 U. S. 960, enforcing 77 NLRB 1, 16; *Marshall and Bruce Co.*, 75 NLRB 90. And in those refusal to bargain cases in which enforcement proceedings were pending when the Act was amended, the Board requested the courts to condition enforcement of the bargaining orders upon compliance by the union within 30 days of the court decree. *N. L. R. B. v. O'Keeffe and Merritt Mfg. Co.*, 178 F. 2d 445 (C. A. 9); *N. L. R. B. v. Brozen*, 166 F. 2d 812, 813-814 (C. A. 2).

The present case, however, does not involve an attempt to aid the bargaining position of a noncomplying union, either directly or indirectly. As the Board observed, "All this proceeding looks toward is a cease and desist order enjoining certain alleged practices that are violative of individual employee rights protected by the Act" (R. 25). Although respondent's strike seniority policy may have been adopted in all its plants, the unfair labor practices with which this proceeding is concerned occurred at respondent's Clearwater plant at Lewiston, Idaho, and respondent is not required to post cease and desist notices except at its Clearwater plant (R. 81). The charging local, which

had jurisdiction over the employees in that plant, was in compliance. The International, with which that local was affiliated, was similarly in compliance.

Essentially, respondents' argument comes to no more than a claim that it should not be prohibited from making further unlawful layoffs because such layoffs might occur in a plant whose employees are members of one of the noncomplying locals and, accordingly, such a prohibition might in some fashion benefit that local. In answer, the Board stated: "That members of other locals which are not now in compliance may also incidentally derive benefits from an an unfair labor practice finding in this case, is immaterial" (R. 25). The charge in this case might properly have been filed by individuals with no fewer incidental benefits to the noncomplying locals.¹⁸ In the Board's view, the right of the charging local to file a charge on behalf of its affected members was no less.

We submit that whether the statutory requirements have been met in this case hinges on the answer to one simple question, i.e., were the charging labor organization and "any national or international labor organization of which it is an affiliate or constituent unit" in compliance. Since the undisputed answer is in the affirmative, issuance of

¹⁸The Board has consistently proceeded upon charges filed by individuals in their own behalf or in behalf of other employees where the issue involved was whether the employer had violated Section 8 (a) (3). See *Luzerne Hide and Tallow Co.*, 89 NLRB, No. 119; *B. F. Goodrich Co.*, 88 NLRB, No. 117; *Globe Wireless, Ltd.*, 88 NLRB, No. 211; *Olin Industries, Inc.*, 86 NLRB, No. 36; *United Engineering Co.*, 84 NLRB 74. Cf. *N.L.R.B. v. Fulton Bag & Cotton Mills*, 180 F. 2d 68, 70-72 (C.A. 10) in which the court upheld the Board's refusal to investigate whether an individual who filed the charge on behalf of a discriminatorily discharged employee was a Communist. The court there held that neither the Communist membership of the charging individual nor his motives could deprive the Board of jurisdiction.

the complaint was authorized by the Act.

CONCLUSION

It is respectfully submitted that the complaint was properly issued, that the Board's findings are supported by substantial evidence, that its order is valid and proper, and that a decree should issue enforcing the order in full.

ROBERT N. DENHAM,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

A. NORMAN SOMERS,
Assistant General Counsel,

FANNIE M. BOYLS,

ALBERT M. DREYER,

MAURICE ALEXANDRE,

*Attorneys,
National Labor Relations Board.*

August 1950.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. III, Secs. 151 *et seq.*), are as follows:

SEC. 2. When used in this Act— * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . .

RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; . . .

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be en-

tertaind, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and by-laws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded \$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor; and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(3) furnish to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secre-

tary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organizations that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

* * * * *

SEC. 10 (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

* * * * *

(e) The Board shall have power to petition any circuit

court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

APPENDIX B

W. A. GREEN (BOARD WITNESS)

REDIRECT [Tr. 190], PAGES 16 THROUGH 25

MR. GEORGE: (Q) They tried to explain this plant seniority yesterday at the hearing. It never was clear to me just how you figured out this, and, then, the plant seniority given a job. Can you help me out on that at all We will take the common laborer's job in the Carpenter Department, that is due some place else?

A. Well, the boys rather understood that common labor was a pool, and that he had rights from the first day he came on the plant, and if he was laid off, why, he would have a job as long as there was a common laborer on the plant with less rights than him, if he was capable of handling that job.

Q. Does that extend for anything beyond common labor?

A. Well, if a man, a skilled man, was laid off of a skilled job, he would probably revert back to common labor, unless there was another less skilled job that he had rights on. Then, he would maintain a job on the plant, his plant rights.

Q. Well, am I right in assuming, then, that as far as common labor is concerned, that he is supposed to exhaust his seniority in the department, and if by exhausting it, he doesn't have a job, then, he can look to the other department and see whether or not he has seniority, and bump somebody over there to get a job, is that right?

A. Yes.

[Tr. 198], Lines 16 through 25

MR. MERRICK: (Q) Mr. Green, anyway to your knowledge, the reason given to these men why they were laid off, was because of lack of plant seniority?

A. Yes.

Q. Do you know if their work records as to whether or not their work was satisfactory or excellent, was that brought into the picture at all on their lay-offs?

A. Well, this job that Slater was on, I believe that strike seniority was mentioned, but Slater was on the job before October 13th, so, he maintained the job.

[Tr. 199], Lines 1 through 9

Q. Well, in your opinion, do you think the controlling factor in the lay-offs was the question of strike seniority?

A. It was the question that Slater had come back prior to October 13th and had that particular job, so, Walters couldn't bump him off of it.

Q. And would you say that was, also, true as to Mr. Cox and Mr. Cloninger?

A. I am not too familiar with all the jobs that they held, but I believe it was, yes.

POTLATCH FORESTS, INC. at Lewiston, (State of Maine)
(Name of employer) (Address of establishment) (State)
Idaho employing 4,000 workers in Logging and lumber manufacturing
(City) (State) (Nature of business)
has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) subsections (1) and (3) and (5) of said Act, in that:

2. Said employer has discriminated against members of the undersigned union in the lay-off, re-call and promotion of workers, and has adopted and followed the policy of giving first preference in such matters to employees who worked during a strike held in September and October 1947 and has refused to accord the members of the undersigned union who participated in said strike the seniority rights to which they are entitled under the collective bargaining agreement with the undersigned and, in particular, beginning about January 9, 1949 when operations were curtailed, laid off (all Cloninger, Claude Walters and Wilbur Hollenbeck, while retaining in its employ in the lay-off) workers with less seniority for the reason that said employees and each of them participated in said strike and were active members and supporters of the undersigned union.

Said company has advised its employees that it will give first preference employment in connection with lay-off and re-call of men to employees who worked during the strike and discriminated against members of the undersigned union who participated in said strike, and has by other acts and statements coerced and intimidated its employees from joining or remaining members of the undersigned union.

Said employer has at all times since on or about October 10, 1947 failed and refused to bargain in good faith with the undersigned union with respect to grievance arising out of the application of the seniority clause of the collective bargaining contract and has taken the arbitrary position, contrary to law, that all employees who worked during the strike are entitled to special preference and super-seniority.

3. The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.
(Paragraphs 3, 4, and 5 apply only if the charge is filed by a labor organization) The labor organization filing this charge, hereinafter called the union, has complied with Section 9(f)(4), 9(f)(11), and 9(g) of said Act as amended, as evidenced by letter of compliance issued by the Department of Labor and bearing case number: _____. The financial data filed with the Secretary of Labor is for the fiscal year ending _____.

A certificate has been filed with the National Labor Relations Board in accordance with Section 9(f)(B)(2) stating the method employed by the union in furnishing to all its members copies of the financial data required to be filed with the Secretary of Labor.

4. Each of the officers of the union has executed a non-communist affidavit as required by Section 9(b) of the Act.
5. Upon information and belief, the national or international labor organization of which this organization is an affiliate or constituent unit has also complied with Section 9(f), (g), and (h) of the Act.

6. INTERNATIONAL WOODWORKERS OF AMERICA, Local 6-364
(Full name of labor organization, including local name and number, or person filing charge)
Lewiston, Idaho _____
(Address) (City) (State) _____
(Telephone number)

7. INTERNATIONAL WOODWORKERS OF AMERICA
(Full name of national or international labor organization of which it is an affiliate or constituent unit)
Governor Building Portland Oregon
(Address) (City) (State) _____
(Telephone number) BR 5687

DO NOT WRITE IN THIS SPACE	
Case No. <u>19</u>	CA <u>107</u>
Date filed <u>7/1/49</u>	
9(f), (g), (h) checked _____	

By A. F. Hartung
(Signature of representative of person filing charge)
International Vice-president
(Title, if any)

Subscribed and sworn to before me this _____ day of _____, 19____, at February 1949 at Portland, Oregon
as true to the best of deponent's knowledge, information and belief.

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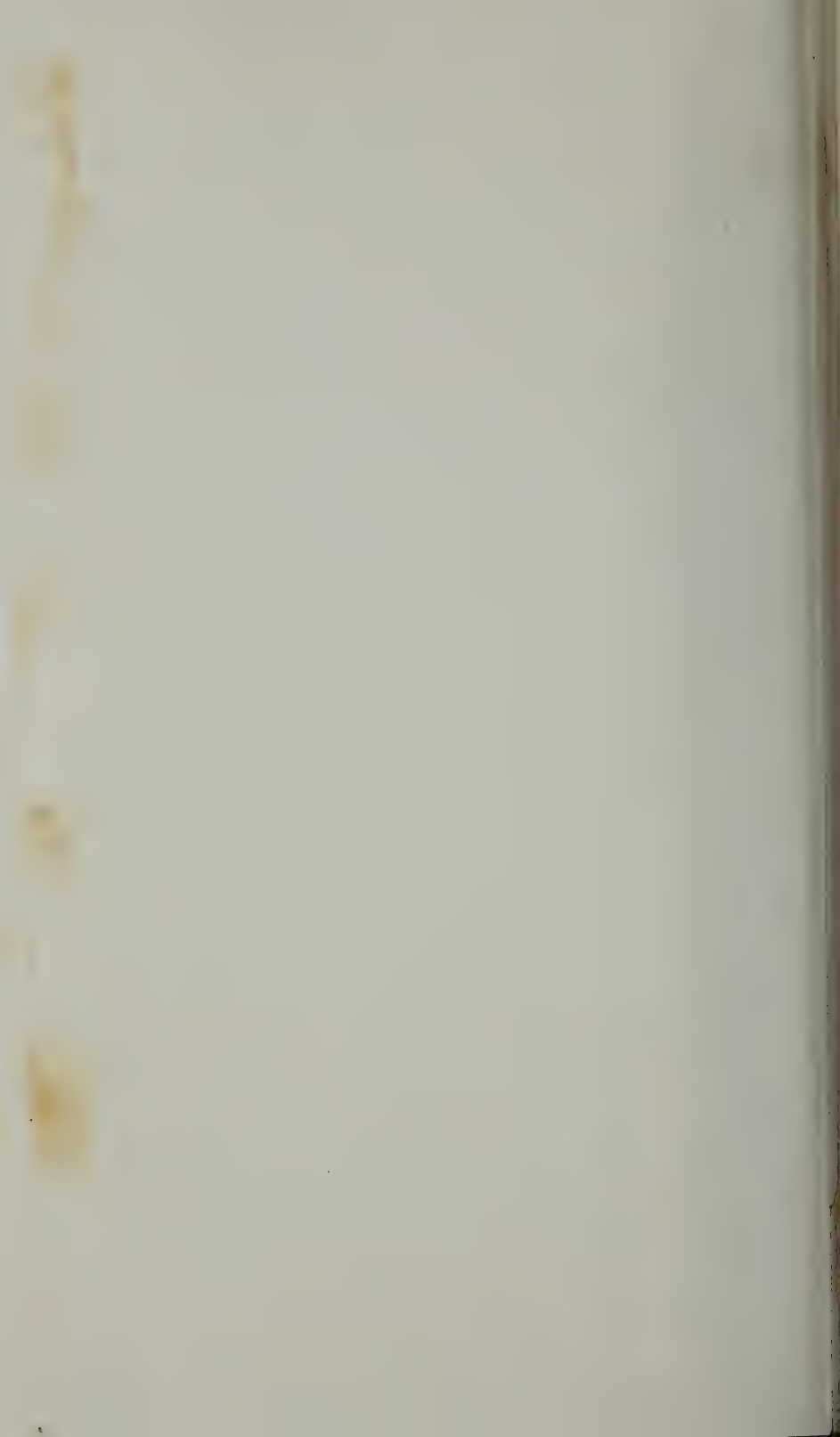
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

POTLATCH FORESTS, INC.

and

INTERNATIONAL WOODWORKERS OF AMERICA,
LOCAL 10-364

Case No. 10-CR-166

AFFIDAVIT OF SERVICE OF C. W. WOOD

DATE OF MAILING 2/17/49

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that the date indicated above I served the above-entitled document(s) by post-paid registered mail upon the follow persons, addressed to them at the following addresses:

POTLATCH FORESTS, INC.
LEWISTON, IDAHO

REGISTERED NO. 243258
RETURN RECEIPT NO. 1578

General Counsel's 1-B

4C
(24)

Subscribed and sworn to before me

this 17th day of February, 1949

C. W. WOOD
Notary Public

Designated Agent.

NATIONAL LABOR RELATIONS BOARD

FILED IN 10-CR-166
FEB 18 1949

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

POTLATCH FORESTS, INC.

and

INTERNATIONAL WOODWORKERS & CABINETMAKERS UNION,
LOCAL 10-364

Case No. 19-01-166

AFFIDAVIT OF SERVICE OF STEWART ALEXANDER

DATE OF MAILING 3/21/49

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid registered mail upon the following persons, addressed to them at the following addresses:

POTLATCH FORESTS, INC.
LEWISTON, IDAHO

REGISTERED NO. 243333
RETURN RECEIPT REQUESTED

General Counsel's 1-C

Subscribed and sworn to before me

this 21 day of MARCH, 1949

[Signature]
JOSSEPH E. MIZENKO
Designated Agent.

NATIONAL LABOR RELATIONS BOARD

[Signature]
FLORENCE M. ...
...
...
...



CHARGE AGAINST EMPLOYER

1 Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that

ALBENDEN
POTAWATCH FORESTS, INC.

(Name of employer)

(Address of establishment)

(City, State)

Idaho **L000** **Idaho**
(State) (Employment) (Number)

(Nature of business)

has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) of subsection (1) and (3) of said Act, in that:

2 Said employer has discriminated against members of the undersigned union in the lay-off, recall and promotion of workers, and has adopted and followed the policy of giving first preference in such matters to employees who worked during a strike held in September and October 1947 and has refused to accord the members of the undersigned union who participated in said strike the seniority rights to which they are entitled under the collective bargaining agreement with the undersigned, and, in particular, beginning about January 9, 1948 when operations were curtailed, laid off Earl Cloninger, Claude Walters and Wilbur Hollenbeck, while retaining in its employ in their positions workers with less seniority for the reason that said employees and each of them participated in said strike and were active members and supporters of the undersigned union.

Said company has advised its employees that it will give first preference employment in connection with lay-off and re-call of men to employees who worked during the strike and discriminated against members of the undersigned union who participated in said strike, and has by other acts and statements coerced and intimidated its employees from joining or remaining members of the undersigned union.

Edward L. ...

3 The undersigned further charges that said unfair labor practices affecting commerce within the meaning of said Act: (Pursuant to Section 3, 4, and 5 apply only if the charge is filed by a labor organization.) The labor organization filing this charge, hereinafter called the charging union, has complied with Section 9(f)(4), 9(f)(8)(1), and 9(g) of said Act as amended, or evidenced by letter of explanation issued by the Department of Labor and bearing code number _____. The financial data filed with the explanation issued by the Department of Labor is for the period _____. The certificate has been filed with the National Labor Relations Board in accordance with Section 9(f)(8)(2) stating the rights and interests of the union in furnishing to all its members copies of the financial data required to be filed with the Secretary of Labor.

4 Each of the officers of the union has executed a non-communist affidavit as required by Section 9(h) of the Act. Upon information and belief, the national or international labor organization of which this organization is an affiliate, subordinate or constituent unit has also complied with Section 9(f), (g), and (h) of the Act.

5. **INTERNATIONAL WOODMEN OF AMERICA, Local #364**

(Full name of labor organization, including local name and number, or person filing charge)

(Address) (City) **Idaho** (Telephone number)

7. **INTERNATIONAL WOODMEN OF AMERICA**

(Full name of national or international labor organization of which it is an affiliate or constituent unit)

(Address) (City) **Idaho** (Telephone number)

Case No.	12	CA	166
Date filed	5/26/49		
9(f), (g), (h) charged	6-3a - 4 - 9		

By **A F Hocking**
(Signature of representative of person filing charge)
International Vice-President
(Title, if any)

Submitted and sworn to before me this 15 day of March 19 49 at Portland, Oregon

as true to the best of deponent's knowledge, information and belief.

118
23

(SUBMIT ORIGINAL AND FOUR COPIES OF THIS CHARGE)

Marion T. Welborn
Marion T. Welborn
(Signature of Secretary of Labor)
My Commission Expires 2-22-53

Article XIX — Revision and Termination

(a) Except as it may be affected by the wage clause, this agreement shall be in full force and effect until April 1, 1947, and shall continue thereafter for yearly periods unless written notice of termination or revision is given by either party, subject to the terms set forth in this article.

(b) Unless mutually agreed to, either party shall notify the other of a desire to change the terms of this agreement not less than sixty (60) days prior to the expiration date, and negotiations shall start thirty days hence.

(c) If the agreement is opened by either party, then the other party shall have thirty (30) days after the receipt of the notice to name its desired revisions.

(d) If no agreement is reached at the expiration of this agreement and negotiations are continued, the agreement shall remain in force up to the time a subsequent agreement is reached, but shall terminate if agreement is not reached by May 1, unless otherwise mutually agreed to by the parties.

(e) This agreement may be terminated on April 1 of any year by either party giving at least sixty (60) days written notice to the other party of a desire to terminate. However, both parties agree to meet in negotiations within fifteen (15) days of receipt of notice for the purpose of negotiating possible renewal of the agreement. If negotiations continue after April 1 of any year, the existing contract shall remain in full force and effect until May 1, unless an extension is mutually agreed to by the parties or a new agreement has been mutually accepted.

AGREED INTERPRETATION OF CLAUSES ON
WHICH UNION DESIRED CLARIFICATIONS
MAY 7, 1949

1. Preamble Clause, third paragraph:—

The company must remain the judge of what disciplinary action, if any, is taken by the company of any employee who is proven to be disruptive. Likewise, the Union must remain the judge of what disciplinary action, if any, is taken by the Union as to any of its members who is proven to be disruptive.

2. Article I—Recognition:—

The first sentence of the first paragraph means the Union is recognized as the bargaining agent for the employees as certified by the NLRB, March 4, 1944, for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment as covered by this agreement.

3. Article III—Methods for Handling Disputes:—

The next to the last paragraph means the Union will not recognize any other Union's picket line and will go through any such picket line.

4. Article V—Hours of Labor, paragraph (e):—

Time lost on the Holiday cannot be made up on Saturday at straight time unless the Union agrees thereto.

5. Article V—Hours of Labor, Section 2 (a):—

The exception of breakdowns or other shut downs beyond the control of the company applies to the whole of Article V, paragraph (2) (a).

6. Article XI—Holidays, last sentence of the last paragraph:—

The last regularly scheduled shift is completed at straight time even though part or all of the hours are in the calendar holiday. The next shift is the holiday shift subject to the time and one half rate if it is worked.

7. Article VII—Union Security Clause, last paragraph:—

Prior to this agreement on these interpretations, the last paragraph of Article VII, applied to any veteran of the Armed Services of World War II who was employed by the company within one year of his discharge. Any such veteran who is now employed is not required to join the union and if he has or does, he cannot be discharged for failure to maintain his membership in good standing.

After May 15, 1947, the last paragraph of Article VII will only apply to veterans of the Armed Services of World War II who left the employ of the company to enter the Armed Services and who returned to the employ of the company within one year of their discharge. Other veterans of the Armed Services who are hired after May 15, 1947, will be subject to the Union security clause (Article VII).

8. Article IX—Vacation:—

Prior to this agreement on these interpretations an employee was required to be on the payroll at the time the vacation was taken in order to receive the vacation with pay unless he was governed by Section 1 (h) or (i).

For the purpose of the 1947 vacations, the following interpretations will be controlling:

Employees who qualify for three or four day vacations must be on the payroll March 31, 1947, and the date when the vacation is taken. Individuals who qualify for five days vacation with pay and are not employed at the time the vacation is taken will be paid five days vacation pay provided they make application to the Company for the same between May 1 and July 1.

Employees qualified for two weeks vacation with ten days pay must be employees on the payroll at the time the vacation is taken.

9. Article X—Classification:—

If an employee is no longer needed in his job classification and is placed in a lower paying job classification for the balance of the shift he is paid at his higher rate for the balance of that shift. If, during the next day or subsequent days he is no longer needed in the higher paying job classification, the employee shall be informed that he may either lay off or return and work in the job classification available and at that job's rate.

10. Article XII—Seniority:—

The Union contends that 65 year old employees are subject to the seniority clause in the same manner as any other employee. The seniority clause applies to promotions and retention of jobs during curtailment. The company does not consider the retirement of employees for age is any part of this agreement.

11. Article XIV—Wages:—

When the contract is opened or closed on "wage issues" it is opened or closed on all wage questions.

The company and the Union agree to recommend to their respective parties that the 1946 Master Working Agreement, together with the above interpretations, be adopted as the Master Working Agreement for 1947, with dates changed to conform with the year.

It is understood that the wage clause (Article XIV) is still open for further negotiations.

Dated at Lewiston, Idaho, this seventh day of May 1947.

POTLATCH FORESTS, INC.

IWA-CIO LOCALS 361, 358, 119 AND 364

(s) J. J. O'CONNELL	(s) FRED SLEFKIN
(s) C. O. GRAUE	(s) FRANK GORDON
(s) J. C. PARKER	(s) HARRY LEE
(s) J. H. BRADBURY	(s) CHAUNCEY KNOLL
(s) D. S. TROY	(s) WM. SCHWARTZMAN
(s) GEORGE W. BEARDMORE	(s) HUGO WACHSMUCH
	(s) FRANK JENNINGS

(COPY)

May 28, 1947

The Potlatch Forests, Inc. Negotiating Committee at Lewiston, Idaho, and the Northwest Regional Negotiating Committee of the International Woodworkers of America agree to recommend to the parties for whom they have authority to negotiate:

1. A 7¹/₂% per hour wage increase be made effective as of the first day of April 1947, except for scheduled hour employees for whom the increase shall be spread on the basis of a weekly increase in accordance with the formula used when the January 1, 1947, increase was granted. The application of this increase to piece-workers shall be left for local negotiations.

2. That Article XIV, Wages, paragraph (a), be rewritten to provide for a discussion of wages on September 1st, 1947, wording of the wage clause to be worked out by the company and union.

3. The Company agrees to negotiate further on the possibility of the elimination of the wage differential between the Fir and Pine areas; - such negotiations to begin on or immediately following that date as is finally agreed to by the other major lumbering companies or Associations of Companies operating in that portion of the Pine area known as the Inland Empire.

4. That the 1946 Master Agreement, together with the recent interpretations, be signed and extended to April 1st, 1948.

NORTHWEST REGIONAL NEGOTIATING
COMMITTEE, I.W.A.

POTLATCH FORESTS, INC.
NEGOTIATING COMMITTEE

/s/ Ellery Foster

/s/ Roy Huffman

/s/ Ray Lea

/s/ Otto N. Luschel

/s/ O. D. Armstrong

/s/ Pete Nelson

POTLATCH FORESTS, INC.
LEWISTON, IDAHO

January 20, 1949

International Woodworkers of America (CIO)
Governor Building
Astoria, Oregon

International Woodworkers of America (CIO)
Box 10-361
Lewiston, Idaho

International Woodworkers of America (CIO)
Box 10-368
Box 117
Lewiston, Idaho

International Woodworkers of America (CIO)
Box 10-119
Bozeman, Idaho

International Woodworkers of America (CIO)
Box 10-364
2409 Weisgerber Building
Lewiston, Idaho

You are hereby notified that Potlatch Forests, Inc. gives notice that it desires to negotiate a written agreement based on the Master Working Agreement effective April 1, 1946 modified by the subsequent agreements of May 7 and 8, 1947, October 12, 1947 and April 13, 1948, incorporating in one agreement the various interpretations, clarifications and amendments which have never been combined into a single signed agreement.

Very truly yours,

POTLATCH FORESTS, INC.

Doc No. 1949-166 OFFICIAL EXHIBIT No.

by:

Disposition { Identified ☒
Received ☒
Rejected ☐

George W. Boardman

In the matter of

Date 1/20/49

Witness

Bozeman

Reporter

Bozeman

Bozeman

Bozeman

Bozeman

Bozeman

Bozeman

Bozeman

Bozeman

Bozeman

Bozeman

GENERAL COUNSEL'S EXHIBIT 12

LETTERHEAD OMITTED

LEWISTON, IDAHO
General Offices

April 6, 1949

Mr. Howard E. Hilbun, Field Examiner
National Labor Relations Board
515 Smith Tower
Seattle, Washington

Re: Potlatch Forests, Inc.
Case No. 19-CA-166

Dear Mr. Hilbun:

In your letter of March 30, 1949, you requested the following information:

1. Whether or not men working in the larger departments (of which the Clearwater Plant has 8 instead of 6) were eligible for transfer to all of the sub-departments listed thereunder in case of curtailment. The men are eligible for transfer to these sub-departments and other departments in the case of curtailment but in accordance with provisions covering curtailment.

2. You asked for the seniority record of the following employees covered in the charge filed March 15, 1949:

Claude Walters

Gail Cloninger

Wilbur Hollenbeck

Information on Claude A. Walters:

He has always worked at a common labor rate. Hired May 6, 1944, for the pipe crew. Transferred May 17, 1944

to and worked in the unstacker until January 18, 1949. At this time there was a curtailment in the unstacker where Walters was working at the common labor rate. He worked in the replant at common labor rate from January 18, 1949 to January 22, 1949, but could not handle this work. However, on January 20, 1949, he was offered a watching job paying the same rate (common labor) but turned it down saying that his feet could not stand it. His other jobs, however, required him to be on his feet also.. On January 27, 1949, he was offered a box picking job in the replant on the night shift, paying common labor rate plus a night shift differential, but refused that job. His reason was because of the night work and lack of transportation. However, on his work in the unstacker he worked nights when the crews rotated. The bus route passes by his place. He also said he was not too anxious to work because he had some building to do around home and said he would be back when the weather warmed up. On March 2, 1949 he called at the Employment Office and was offered a clean up job in the unstacker on the 3:00 A.M. to 11:00 A.M. shift. He refused that job because he said he had no transportation and asked for a job tending lawns. He was also offered a job helping Axel Isaacson washing down roofs. He refused that job. He went back to work on the dock at common labor rate March 10, 1949 and on March 21, 1949 went to the unstacker at common labor rate. Following the strike of August 7, 1947, he returned to work October 13, 1947. All of his jobs have been common labor jobs and he has refused several which he could do. No grievance was ever filed in connection with this man and his loss of time was due to his own choice.

The man who was retained in the unstacker was Paul Slater whose seniority record is as follows:

Shook Department	1-15-46	to	7-1-46
Replant	7-1-46	to	7-8-46
Shook Department	7-8-46	to	5-9-47
Unstacker	5-9-47	to	8-7-47 (strike)
Unstacker	9-9-47	to	3-14-49

When Slater returned September 9, 1947, during the course of the strike, he was put on an unstacker common labor job. When Walters returned October 13, 1947, after the strike settlement, he was also given a common labor job in the unstacker department.

Information on Gail Cloninger:

He was first hired July 24, 1940, and worked in the Box Factory until December 31, 1941, when he was drafted. He was rehired with veterans re-employment rights August 19, 1943, and went back to work in the Box Factory. He worked up to ripper in the Box Factory. On September 3, 1946, he requested a transfer to the carpenter crew of the maintenance department at common labor where he worked until the strike on August 7, 1947. He returned October 13, 1947 to common labor in the carpenter crew and remained there until it was curtailed December 30, 1948. January 4, 1949, he was offered a job at the same rate and went to work in the cut-up department on January 6, 1949. He worked there until requested time off for a hernia operation. All his work in the Maintenance Department with the carpenter crews was at the common labor rate. He was replaced in the carpenter crew by Dale Cox, a carpenter helper working at 5 cents above common labor when the curtailment came. His employment record is as follows:

Box Factory	11-13-46	to	6-5-47
Carpenter Crew	6-5-47	to	8-7-47 (strike)

Sawmill 10-1-47 to 12-15-47
 Carpenter Crew 12-15-47 to present

The union has also requested information relative to Clifford Greer who remained in the carpenter crew following the curtailment. His seniority record is as follows:

He was hired April 10, 1940 and worked at miscellaneous jobs until April 24, 1940. He then went into the sawmill April 24, 1940, and remained there until April 29, 1946. On that date he went to the carpenter crew and remained there until May 26, 1946, when he was transferred back to the sawmill. On May 1, 1947, he was transferred to the carpenter crew again. Under doctor's orders he was given sick leave August 2, 1947, and returned December 2, 1947. On September 1, 1948, he was promoted to carpenter's helper at five cents above common labor which job he held until the curtailment December 30, 1948.

You apparently have requested the same information from the union as Mr. Gordon has requested it from our Employment Department. We are forwarding a copy of this letter to him.

POTLATCH FORESTS, INC.

Very truly yours,

GEORGE W. BEARDMORE

GWB:wh

cc: Frank Gordon

NO. 12532

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

POTLATCH FORESTS, INC., RESPONDENT

*On Petition for Enforcement of an Order of the
National Labor Relations Board*

**BRIEF FOR POTLATCH FORESTS, INC.,
RESPONDENT**

E. N. ELDER

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GEORGE W. BEARDMORE

Residence: Lewiston, Idaho

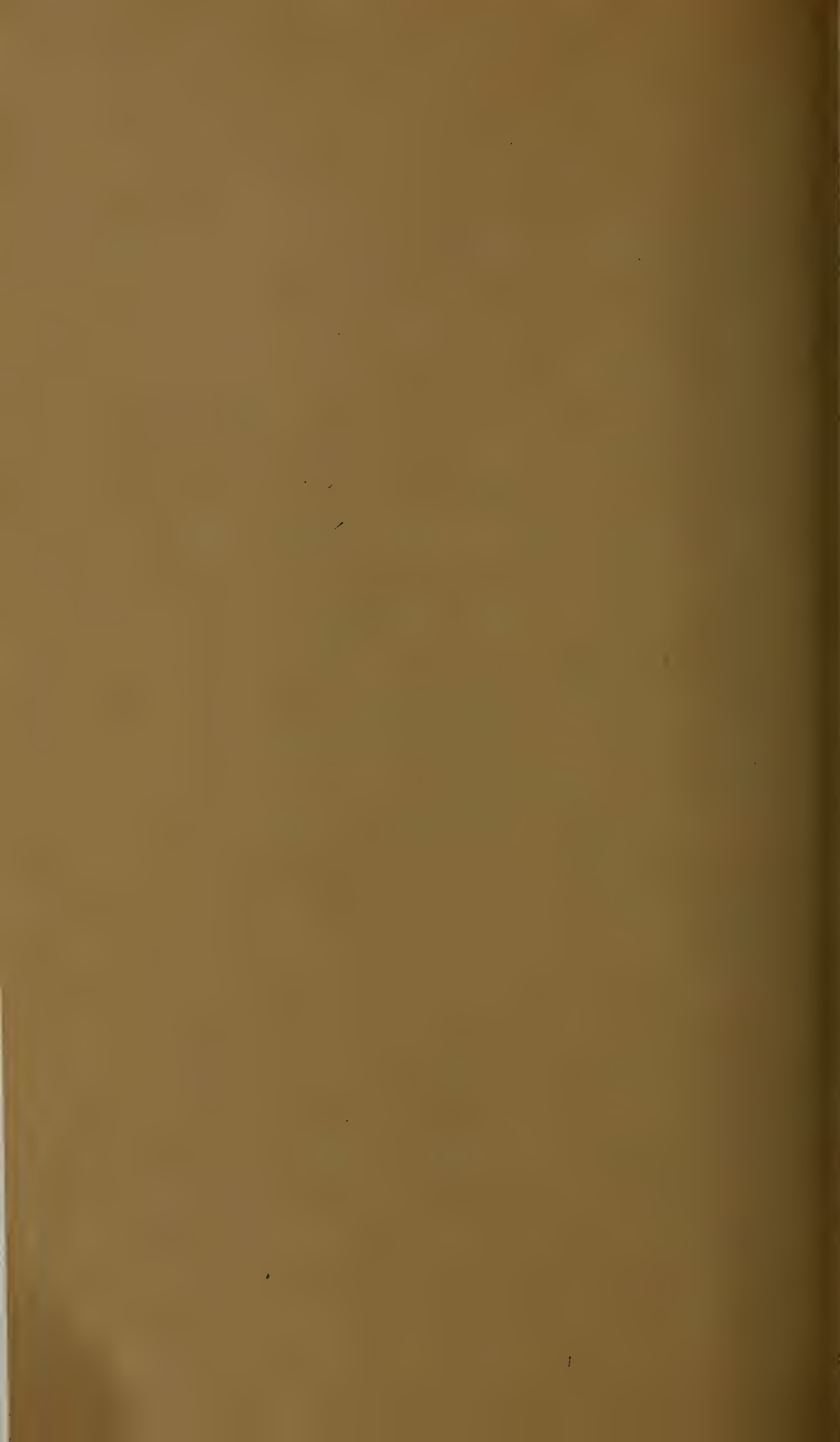
Attorneys for Potlatch Forests,
Inc., Respondent.

FILED

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PAUL P. O'BRIEN,

CLERK



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**In the United States Court of Appeals
for the Ninth Circuit**

NO. 12532

NATIONAL LABOR RELATIONS BOARD, PETITIONER

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POTLATCH FORESTS, INC., RESPONDENT

*On Petition for Enforcement of an Order of the
National Labor Relations Board*

**BRIEF FOR POTLATCH FORESTS, INC.,
RESPONDENT**

STATEMENT OF FACTS

The International Woodworkers of America, C.I.O., and four constituent locals (10-119, 10-358, 10-361, and 10-364) having members among the employees of the bargaining unit in Respondent's operations are recognized jointly as the bargaining agent or Union for the production and maintenance employees. (R. 28)¹. In 1945 and

¹ The printed record is designated "R". References preceding the semicolon, if one appears, refers to the Board's findings; succeeding references are supporting testimony or evidence. Exhibits of the General Counsel are referred to as (G.C. Ex.); those of Respondent as (Res. Ex.).

again in 1946 a collective bargaining agreement, known as the Master Working Agreement, was executed by the Union and the Respondent. (R. 28; Res. Ex. 1, G.C. Ex. 2).

On August 7, 1947, the Union called an economic strike, viz, a strike which was not the result of any unfair labor practice on the part of Respondent, for the purpose of securing a wage increase. (R. 30; 3, 4, 10, 103). Starting about the end of August, employees began to return to work. Respondent hired some new employees and by October 10, 1947, some 1750 employees were working in the Bargaining Unit which normally has a complement of about 2600. (R. 31).

With the strike lost the Union requested a meeting to discuss a settlement. Meetings were held between "top officials" of the International Union and "top management officials" of Respondent. (R. 31, 260-261, 264). During the October 10th meeting the Union submitted a draft of a proposed memorandum of settlement in the same form as later initialled by the parties, except it provided the former employees were to "return to work without discrimination *and without loss of seniority.*" (R. 47; 265). The Respondent refused to agree to it because it would have established full seniority for the strikers without protecting the employees who had returned to work. (R. 265, 277, 305). The officials of the Respondent had pointed out the strikers had lost their vacation rights and the company agreed to rewrite the contract so they would be eligible. (R. 268, 294). The Respondent also agreed to protect the Seniority of the strikers for promotion. (R. 268). It would not agree to *protect* the strikers seniority for purposes of displacing

employees who had returned prior to October 13. (R. 269, 277, 284, 285, 330). It was pointed out this would have no major effect until there was a serious curtailment. (R. 48, 267-268, 284-285, 287). After the discussion the Union negotiators retired and returned shortly with the words "and without loss of Seniority" stricken from the draft. (R. 48, 266, 286, 305). On October 12, 1947, the proposed draft with the stricken clause removed, was dated and initialled by Respondent's Vice-President and General Manager and the first Vice-President of the International Union. (R. 33-34, 261, 264, 288). On October 13th a group of Respondent's high management officials, including the two officials who represented the Respondent during the negotiations, drafted the "Return-to-Work Policy". (R. 34, 245, 328-330, 334). The Return-to-Work Policy has been maintained and followed since that time. (R. 36; 247-249). The memorandum of the settlement (R. 32; 106) and the Return-to-Work (R. 34; G.C. Ex. 5) read as follows:

"As a basis for settlement of the present dispute between the I.W.A. and the Potlatch Forests, Inc., the following is proposed:

1. The Union agrees to withdraw its demands for a $7\frac{1}{2}\%$ wage increase to eliminate the differential. Wages to remain at rates as of August 6, 1947. Picket lines to be withdrawn as of October 13, 1947.

2. All former employees of the Potlatch Forests, Inc., will return to work without discrimination, on Monday, October 13th. Former employees shall return to work by October 22, to protect their

job rights. In the event the job formerly held by the returning employee is not open, the employee will be given other work and receive pay on the basis of the rate paid on his former job.

3. Men previously on gypo basis will be assigned to gypo work if still available. If gypo work is not available, pay will be at the rate shown in wage schedule for the job.

4. The Company has informed the Union that the night shift of the box factory in the Clearwater Mill, cannot be started at this time, due to business conditions, and for that reason, it may not be able to employ all of the former box factory workers immediately. These box factory workers will be given preference over new employees in filling vacancies in other departments.

5. The present contract will remain in effect without change, except that the following is substituted for the 4th paragraph in Article VII.

"As a condition of continued employment, every employee who confirms, to the Company through the Union, his membership in the Union as of November 20, 1947, or becomes a member of the Union after November 20, 1947, shall be required to maintain his membership in good standing."

Dates added 10/12/47.

C. L. B.

W. B.

O. H. L.

Potlatch Forests, Inc. — Return to Work Policy.

“Employees who returned to work October 13th to 22nd inclusive, 1947, will in case of *curtailment*, be laid off ahead of employees who returned to work or were hired on or before October 12, 1947, (settlement date). The order of layoff in each group will be based on each person's previous seniority rights.

Employees who returned to work on or before October 12, 1947, re-established their previous seniority for *all purposes*. Employees who returned to work October 13, to October 22, inclusive, 1947, re-established their previous seniority for purposes of *curtailment as among this group* (returned October 13 to 22, incl.), and for training and *promotion among all groups*.

Employees who returned to work on or before October 22, 1947, but whose jobs had been filled while they were on strike will be given an opportunity to return to their old jobs at the first opening occurring. If this opportunity is passed up then the employee's rate will revert to the rate of the job he holds and he will have no further right to return to his old job.

When an employee, who is on the job convenience rate, is offered a job equal to or paying more than his old job's rate and this opportunity is passed up the employee's rate will revert to the job he holds but shall be given an opportunity to return to his old job when it is open. If he passes

up the opportunity he will have no further right to return to his old job.

When an employee, who is on a job convenience rate, is promoted to a higher paying job and then there is a curtailment he returns to the job his seniority entitles him to and at that job's rate—not at the job convenience rate from which he was promoted.

Employees who returned to work on or before October 22, 1947, will retain all previous seniority rights for purposes of training and promotion.

Former employees who returned to work after October 22, 1947, will be classed as new employees.”

The strike was terminated and the balance of the men started returning to work October 13, 1947. The Union was aware the Respondent was maintaining the policy whereby the striking employees returned with impaired seniority. (R. 37, 109-110, 146-147, 279-281). Shortly after the strike,² grievances were filed over the seniority of the railroad employees and processed through all steps of the grievance procedure, including conciliation, with the Respondent maintaining the Return-to-Work Policy (Ibid).

The Master Working Agreement expired May 1, 1948. However, the expired agreement as modified by the memorandum of settlement and the Return-to-Work Policy was followed by the Respondent until April 1, 1949. (R. 39-40).

² The grievances introduced by General Counsel (Ex. 6A through 6G) show dates as early as October 16, 1947.

In December, 1948, and January, 1949, pursuant to the Return-to-Work Policy on curtailment, Respondent transferred, among other employees, Cloninger and Walters to other departments while retaining others in the department who had returned prior to the termination of the strike (October 12, 1947) but who had less pre-strike seniority. (R. 40-45).

On February 16, 1949, a charge was filed by the Union, signed by the Vice-President of the International, alleging 8 (a) (1) (3) and (5) violations (G.C. Ex. 1A). This charge was amended March 18, 1949, alleging 8 (a) (1) and (3) violations only (G.C. Ex. 1D) and was again signed on behalf of the Union by the International Vice-President. The complaint was issued June 24, 1949. Respondent admitted the Return-to-Work Policy was being maintained but denied it was a violation of the Act, as amended. (R. 8-16). In addition it urged by appropriate and timely pleadings and motions that the proceedings were barred under Section 10 (b) of the Act, as amended, which states no complaint shall issue based upon an alleged violation occurring more than 6 months prior to the filing and serving of the charge and further, that the Board was without authority to issue the complaint by reason of the Union being in non-compliance with Sections 9 (f), (g) and (h) of the Act, as amended (R. 17, 19; 336-337).

Respondent had been maintaining and following the Return-to-Work Policy, with the knowledge and acquiescence of the Union, for more than 6 months prior to the filing of the charge. (R. 37; 109-111, 146-147). With respect to the status of the Union, the record shows the International and two of the four locals were in com-

pliance, and the other two locals had not complied with the Act, as amended. (R. 85).

The Board overruled Respondent's motions. (R. 86, 336-337). It further found the two employees, Cloninger and Walters, had been offered other jobs in other departments and had been later, but prior to the hearing, restored to their former jobs, so neither reinstatement nor back pay was ordered. (R. 63-64). The Board on December 21, 1949, ordered Respondent to cease and desist maintaining and giving effect to the Return-to-Work Policy. (R. 80).

The Petitioner seeks enforcement of its order by this court. The issues before this court are the rulings of the Board on the motions of the Respondent, the appropriateness of the order and whether the Return-to-Work Policy is a violation of Sections 8 (a) (3) and (1) of the Act, as amended.

SUMMARY OF ARGUMENTS

I.

The National Labor Relations Board erred in finding that the Respondent by inaugurating and maintaining its Return-to-Work Policy (R. 34-35) discriminated against its employees in violation of Section 8 (a) (3) and (1) of the Act. The strike settlement (R. 32-33) provided that employees who had returned to work prior to the strike settlement could not be displaced by the employees returning after the settlement. The Return-to-Work Policy protected the employee who had returned to work prior to the settlement guaranteeing to him that the position he accepted would be permanent. It provided

that the men returning after the date of settlement could not displace him from his job on the date of their return or on the date of any subsequent curtailment. The Return-to-Work Policy did not differentiate between union and non-union employees. The method of selection for lay off is that of seniority between two groups voluntarily established by members of each group in lawful exercise of their respective right to work or to strike and without any unfair labor practice having been committed by Respondent. The policy does not interfere with, restrain or coerce employees in the exercise of rights guaranteed under Section 7 of the Act. The policy did not and does not encourage or discourage membership in any labor organization, and the findings to that effect are not supported by substantial evidence.

II.

The National Labor Relations Board erred in failure to dismiss the complaint on the grounds the policy and practice complained of was established by agreement with the union officials who settled the strike and was maintained and followed with knowledge and acquiescence of the Union for over six months prior to the filing of the charge upon which the complaint was based and therefore barred under Section 10 (b) of the National Labor Relations Act, as amended.

III.

The Bargaining Agent filing the charge was not in compliance with Section 9 (f), (g) and (h) of the National Labor Relations Act. Therefore, it was disqualified from using the processes of the Board and the complaint should not have issued.

ARGUMENT**I.**

The Board erred in finding Respondent violated Section 8 (a) (3) and (1) of the amended Act by following a Return-to-Work Policy which prevented displacement of an employee who went to work during the course of an economic strike³ by an employee who did not return until after the strike was settled. The strike was not caused or prolonged by any unfair labor practice of the Respondent. (R. 30-31).

The Board's order is directed to the maintaining and giving effect to that policy by ordering the Company to cease and desist. (R. 81). Insofar as employees Cloninger and Walters are concerned, the Board found neither was entitled to back pay and that they had returned to their old jobs prior to the hearing. There is no issue before this court concerning any specific individual. The issue is whether the Return-to-Work Policy of the Respondent is an unfair labor practice. (R. 63-64, 79-81).

Paragraph 2 of the initialed memorandum of settlement (R. 32-33) provides as follows, to-wit:

"All former employees of Potlatch Forests, Inc. will return to work without discrimination, on Monday, October 13. Former employees shall return to work by October 22nd to protect their job rights. In the event the job formerly held by the returning employee is not open, the employee will be given other work and will receive pay on

³ The term "economic strike" is descriptive of a strike not caused or prolonged by any unfair labor practice by Respondent as distinguished from an "unfair labor practice strike" caused or prolonged by an unfair labor practice.

the basis of the rate paid on his former job." (R. 32-33).

The Return-to-Work Policy (R. 34-35) adopted by the Respondent immediately following the strike settlement, was based on the initialled memorandum of settlement and the negotiations leading up to the settlement. The substance of that policy is that employees who returned to work October 13, 1947, to October 22, 1947, inclusive, retained their previous seniority for all purposes except they could not displace an employee who returned to work or was hired during the course of the economic strike. Employees who did not return to work on or before October 22 were classed as new employees.

The Petitioner does not question the validity of paragraph 2. (Supra). The interpretation by the Board in simple terms means that an employee who returned October 22nd could not displace an employee who returned to work prior to October 13, but in the event of a curtailment on October 23rd he could displace that employee. Such a construction is not reasonable, logical or founded in fact.

The intention of paragraph 2 is clear. Employees who returned to work prior to October 13, the date the strike ended, would be protected in their jobs. In other words, no employee returning after October 12th, could displace employees who had returned to work or were hired during the economic strike. The record is clear and the Board so found that the paragraph originally contained the words, "without discrimination and without loss of seniority." (R. 47-48). The record is also clear that the negotiators for the Union retired and struck out the words, "and without loss of seniority" after the negotiators for

the Respondent pointed out that the employees who were then working would not be protected against displacement by returning workeres. (R. 47-48).

Respondent agrees that Section 2 (3) of the amended Act, defines the term "employee" to "include any individuals whose work has ceased as a consequence of, or in connection with, any current labor dispute." Even though an individual on economic strike remains an employee under the statute, it does not follow that his status as an employee during or after the strike is or will be the same as prior to the strike. Such individuals remain employees for the remedial purposes specified in the Act only. *N.L.R.B. v. Mackay Radio and Telegraph Company*, 304 U.S. 333, 2 L.R.R.M. 610, at 615. The Court in that Case further stated that an economic striker may be replaced during an economic strike. The Court said:

"The assurance by Respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled."

The facts in the case at bar show that of 2600 economic strikers 1750 had returned to work prior to October 12, 1947. (R. 31; 262-263). All employees who had not returned by October 12th were permitted to return prior to October 23 and was assured a job at his old rate of pay. In other words, the employee who returned prior to October 12th was given assurance that he would not be displaced and the employee returning after October 12 and prior to October 23 was given the assurance of a job at his old rate. To clarify the issue and the respective

positions of the parties we submit this problem: Employee A returned prior to October 12th and was given a job of setter. On October 22nd, employee B who held that job prior to the strike returned. There was no opening at that time in the position of setter so B was given a lower rated job but paid at the setter's rate of pay. A week later, due to business conditions, a layoff was necessary. Employee B was originally employed by Respondent before employee A. It is the position of the Petitioner that employee B could now displace employee A. It is the position of the Respondent that employee B could not displace employee A and could displace only those employees among the group who returned after October 12th who were junior to him. Any interpretation other than that of the Respondent is inconsistent and wholly illogical with the initialled memorandum of settlement and the negotiations surrounding the elimination of the words, "without loss of seniority". Paragraph 4 of the settlement memorandum (R. 33) also shows the intent of the negotiators in connection with seniority on curtailments. The settlement made no differentiation between the then immediate curtailment in the Box Factory and a future curtailment. Paragraph 4 specifically provided that due to business conditions the Respondent may not be able to employ all the former box factory workers immediately. They could not displace other employees in other departments under curtailment seniority practices the Petitioner insists should be applied. There is no logical reason to support the position that in a future curtailment they could displace employees who they could not displace during the present then existing curtailment.

The Mackay Radio Case (Supra) does not hold, as contended by Petitioner, that an employer must reinstate an economic striker upon the termination of the strike if there is a vacant place which he can fill. That case merely holds an economic striker remains an employee for the remedial purposes specified in the Act. (See also N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240). In that case an economic strike was called. Some of the employees had returned to work and 11 employees had been transferred from other operations with the assurance their positions would be permanent if they so desired. The company then made up a list excluding 11 strikers who the company said would have to file applications for reinstatement. It developed only 5 of the new men transferred desired to stay. Of the original list of 11, the 5 strikers who were most prominent in the activities of the Union and the strike were not reemployed and told their activities made them undesirable to the company. The Court found they were discriminated against for that reason. The Court did point out the company might have refused reinstatement on grounds of skill or ability or it might have resorted to any one of a number of methods of determining which of its striking employees would have to wait. The unfair labor practice remedied in the Mackay Case was the discriminatory method of selection from among a group of strikers. It is a reasonable inference to assume that had the selection been made from the group remaining on strike on the basis of their seniority the court would have found no unfair labor practice to remedy. In the case at bar all employees still out on strike were permitted to return to work regardless of whether they were members of the

Union or had actively participated in the strike. In the case at bar there was no selection or segregation or making a choice among employees who were still out on strike. Regardless of union membership, regardless of activity in the strike itself, all the employees returning after October 13, returned as a group without discrimination. The Respondent in this case had assured the employees then at work, that those employees who had returned to work during the strike would not be displaced and their employment permanent. The memorandum of settlement reassured them of their jobs. The selection for lay-off in the curtailment was made from the group who returned after the strike settlement on the basis of their seniority within that group. The Return-to-Work Policy does not establish a prohibited discriminatory method of selection as was used in the Mackay Radio case.

Under the settlement each returning striker had a job at his former rate and on the same basis as all other employees in the group which did not return until after the termination of the strike. There had been no interference with, restraint or coercion of employees by the Respondent in the exercise of the rights of the employees guaranteed under Section 7 before, during or after the strike. There was no discrimination at any time by the Respondent in regard to hire or tenure of employment to encourage or discourage membership in any labor organization as prohibited by Section 8 (a) (3). In other words, there was no unfair labor practice in connection with the labor dispute.

During and after the termination of the strike there was no basis upon which the Board could order the reinstatement of the employees still remaining out on strike

“without prejudice to their seniority or other rights or privileges” as it did in *N.L.R.B. v. Republic Steel Corp.*, 114 F 2d 820 (C. A. 3). The Union could not negotiate a reinstatement for them “without discrimination and without loss of seniority”. It could only negotiate a reinstatement “without discrimination” but with “impaired seniority”. Such was necessary to protect the jobs of the employees then lawfully exercising their right to work. In other words, in the event of a future curtailment to the point where Respondent needed only 1750 employees that number of employees would be the group working October 12 just prior to the termination of the strike. Such a situation would leave all parties in exactly the same status as they were on October 12th when there was no remedial action the Board could have taken. The termination of the strike left the Union and the individuals who were not working prior to the termination in the same status in which they had voluntarily placed themselves by exercising their rights under the Act and without interference or discrimination on the part of the Respondent. If the settlement and the administration of the Return-to-Work Policy under the settlement had placed the Union and those individuals in a status less favorable than the status in which they voluntarily placed themselves then a charge of discrimination in violation of Section 8 (a) (3) might be well founded. In the case at bar, the Union and the employees who returned under the settlement and the Return-to-Work Policy were not placed in a less favorable status nor has the fact that the Respondent has followed the settlement and the Return-to-Work Policy placed the Union or any employee in a less favorable status.

It was recognized that a severe curtailment was not then anticipated at the time of the settlement. Minor ones involving lesser numbers is a normal condition in an industry. The Return-to-Work Policy protected returning employees on an equal basis among a group as to which no unfair labor practice had been committed. It provides they would be laid off on the basis of their old seniority established under the Master Working Agreement as among that group. There was no discrimination on the basis of who was or was not a Union member, who was active or not active on the picket line, who was a leader or non-leader during the strike, who was violent or not violent in their activities or on any other basis other than the seniority they had as among their group. It was a grouping in which they had voluntarily placed themselves without violation of the Act on the part of the Respondent. This method of lay-off was a method resorted to which did not violate the Act. The Return-to-Work Policy processes minor curtailments on exactly the same basis as if a major curtailment was developing that would reduce the crew to the original 1750 employees working just prior to the termination of the strike. It is a method of selection which does not violate the provision of the Act, as amended, and does not invoke the remedial powers of the Board.

The Petitioner in the case at bar relies upon the case of *N.L.R.B. v. Republic Steel Corp.*, 114 F. 2d 820 (See same case 107 F. 2d 472) for the proposition that striking employees upon reinstatement are entitled to be "treated in all matters involving seniority and continuity of employment as though they had not been absent from work". Such is not the holding in that case. In that case there was

an unfair labor practice strike caused by most willful and flagrant violations of the Act by the employer. Because of these unfair practices the striking employees were reinstated "*without prejudices to their seniority or other rights or privileges,*" under the remedial powers of the Board. (Emphasis supplied). Under such a reinstatement by the Board the Court held they were to be treated as though they had not been absent from work. Such was not the type of reinstatement in the case at bar.

The Petitioner states the proposition that if an employer grants seniority rights he may not discriminate against employees in conferring those rights on the basis of whether or not they have engaged in a strike or other union or concerted activities protected by the Act. The point which the Petitioner has overlooked is that the seniority rights conferred by the Respondent do not interfere with, restrain or coerce employees in the exercise of their rights under Sections 7 and 8 (a) (1) or discourage membership in the Union as prohibited by 8 (a) (3) because the rights conferred would in the event of curtailment merely return the employees to the status they voluntarily chose without fault or violation of the Act by Respondent. Neither do the cases cited by the Petitioner support that proposition and they are readily distinguishable on the facts from the case at bar. The case of *N.L.R.B. v. Walt Disney Products*, 146 F. 2d 44 (C. A. 9), certiorari denied, 324 U. S. 877, was one of a discriminatory discharge in violation of Section 8 (a) (3) after the employee had been reinstated by arbitration on the basis that he was not to be "*subject to discharge incident to reorganization except for cause*".

The case of *N.L.R.B. v. Star Publishing Company*, 97

F. 2d 465 (C. A. 9) was one in which men went on strike because of an unfair labor practice committed by the employer. The employer refused to reinstate the individuals to their regular positions and employment. The Board ordered "*immediate and full reinstatement to their former positions without prejudice to their seniority and other rights and privileges*". (Emphasis supplied). Under the facts in that case the Board was justified in applying its remedial powers to correct an unfair labor practice and thereby effectuate the policy of the Act. In the case at bar, the strike was not caused by an unfair labor practice of the Respondent. The case of *N.L.R.B. v. Sandy Hill Iron and Brass Works*, 165 F. 2d 660 (C. A. 2) the court enforced the order of the Board. (69 NLRB 42, 18 LRRM 1219). The employer had a long history of anti-union prejudices. It reduced the working force following a strike by selecting a disproportionate number of union members for the lay-off and failed to reinstate 13 members. It cannot be said that the Board in that case was not justified in finding the method of selection for the lay-off was discriminatory for the purpose of discouraging membership in the labor organization in violation of 8 (a) (3). In the case at bar there is no charge or evidence of anti-union hostility. The method of selection is that of seniority between two groups voluntarily established by members of each group in lawful exercise of their respective right to work or to strike and without any unfair labor practice having been committed by Respondent.

The case of *Polish National Alliance v. N.L.R.B.*, 136 F. 2d 175 (C. A. 7) was one in which members of the union went out on strike as a result of the employers

refusal to bargain with the union and other unfair labor practices. Their status was involuntary as the result of unfair labor practices. The employees then gave up their strike and made application for reinstatement. The Board, in the application of its remedial powers, ordered reinstatement of the employees and that they be made whole. As repeatedly pointed out above, such was not the facts in the case at bar where the employees were reinstated with "impaired" seniority to protect employees who had returned to work.

The case of *N.L.R.B. v. Waterman S. S. Corp.*, 309 U. S. 206 was an 8 (a) (3) violation case. The employer discharged members of the CIO in preference to members of an A. F. of L. Union. Under the maritime law the question was raised as to whether there was a contract of employment with the individual members of the CIO Union and whether they had reemployment rights under that law. The Court in that case held that for the purpose of the Act it was immaterial that the employment of the individual is at will and terminable at any time by either party or whether it was governed by formal written agreement. In either event the Board had remedial authority to correct an unfair labor practice under 8 (a) (3) where the discrimination in tenure or other condition of employment was for the purpose of discouraging membership in a labor organization. There was ample and sufficient evidence in that case to support the findings that the tenure of employment was terminated solely because of membership in the CIO Union, and to discourage membership in that Union and encourage membership in the A. F. of L. Union. There is no such evidence

in this case as to such a purpose or that the Return-to-Work Policy of the Respondent had such an effect.

General Counsel before the Board (R. 88) stated the Board was relying upon the General Electric Case, 80 N.L.R.B. 510, (23 LRRM 1094). He further stated the complaint did not allege an independent 8 (a) (1) violation but was relying upon showing a violation of Section of 8 (a) (3). (R. 88). In a proceeding against an employer for engaging in the unfair labor practice of discrimination under 8 (a) (3) the Board has the burden of proving that the action of the employer was for the purpose and had the effect of encouraging or discouraging membership in a labor organization. A finding of the Board that the employer engaged in an unfair labor practice under Section 8 (a) (3) is not supported by substantial evidence in the absence of evidence that the act of the employer had the effect of discouraging membership in the union. *Stonewall Cotton Mills v. N.L.R.B.*, 129 F. 2d 629 (C. A. 5), certiorari denied, 317 U. S. 667, 87 L. ED. 536. In that case the Court said,

"It must be borne in mind that this charge is not sustained by evidence and a finding merely that persons were discharged because of their union activity. To make out a case under it, it must appear that an employer has by discrimination in regard to hire, etc., encouraged or discouraged membership in any labor organization. This requires proof of both the purpose and effect of the action under review. *N.L.R.B. v. Air Associates*, 121 F. 2d 592. * * * That same burden is on it here when as petitioner seeking enforcement of its order, it seeks to point out to us that its findings

as judge, that this was established, are supported by substantial evidence.”

Without violating Section 8 (a) (3) of the Act, Respondent could lawfully discriminate against economic strikers if it did not discriminate against them for the purpose of encouraging or discouraging membership in the Union. *Western Cartridge Co. v. N.L.R.B.* (C.A. 7) 137 F. 2d 855. It does not follow that a violation of 8 (a) (1) is a violation of 8 (a) (3) (*id.*). Section 8 (a) (1) is a distinct and independent Section from 8 (a) (3) and for an entirely different purpose. There is no evidence of an 8 (a) (1) violation during the strike nor in adopting and maintaining the Return-to-Work Policy. The exercise of the employees’ rights were in no way interfered with by Respondent. There is not one scintilla of evidence that the adoption and administration of the Return-to-Work Policy were for the purpose of or had the effect of encouraging or discouraging membership in the IWA-CIO Union. The Return-to-Work Policy and the practices thereunder in the event of a curtailment would merely return the employee to a status to which he had voluntarily placed himself prior to the termination of the strike.

Both the General Counsel and the Petitioner rely on the case of *General Electric Co.*, 80 N.L.R.B. 90, 23 LRRM 1094, for the proposition that “except to the extent that a striker may be replaced during an economic strike, his employment relationship cannot otherwise be severed or impaired because of his strike activity.” That statement in that case was premised on the *Mackay Radio and Telegraph Co. Case* (*Supra*). As pointed out above under the discussion of that case, such is not the holding of the *Mackay Radio case*. The facts in the *General Elec-*

tric Company Case (Supra) show there was an economic strike. Operations had not resumed during the period of the strike. The strike was terminated and the agreement in general terms provided, "there shall be no discrimination against the employee by either the company or the union." The employer then classified its employees into two groups on the basis of their willingness to work during the strike for the purpose of granting or withholding continuous service credit for the period of the strike. Employees who indicated a willingness to work by returning to work as soon as physically possible were given service credit and paid full wages for the entire period of the strike. In that case the Board found that continuous service credit did not itself constitute compensation. Nor was it per se a condition of employment. It was simply a basis for the determination of certain real benefits, such as seniority, vacations and pensions pursuant to the collective bargaining contract in force. The Board further found, in any event, even though under the contract the strikers may have enforceful rights in other forums, it did not follow that the Respondent's treatment of the strikers constituted per se an unfair labor practice. The majority of the Board then found that while non-strikers were compensated by the accrual of vacation and retirement benefits, as well as by money wages for the period of the strike even though they did no actual work, it did not regard that as unlawful discrimination against the strikers. However, the majority of the Board then made the illogical distinction between seniority as compared to wages, vacations and pensions, and said,

"Unlike wages, vacations and pensions, whose sole aspect is monetary compensation for work per-

formed during the employment relationship, relative seniority, as applied in the Respondent's plants, in addition to any compensatory characteristics it may possess is one of the factors upon which the individual employee's tenure of employment may depend."

This distinction is illogical and unfounded. Wages, vacations and pensions are "conditions of employment" as is tenure. The sole value of tenure is its compensatory characteristics be they material or relative. The majority of the Board then ordered the employer to cease and desist from discouraging membership in a labor organization by in any manner discriminating against any of its employees in regard to their tenure or terms or conditions of employment. The Respondent in the case at bar particularly calls the attention of the Court to the dissenting opinion of Board member Gray. That opinion is the correct construction of the National Labor Relations Act, as amended, in its application of Sections 8 (a) (1) and (3) during strikes not caused by or prolonged by an unfair labor practice of the employer. Board member Gray dissenting in part said:

"I concur in the majority's findings and order, except insofar as the majority finds that the modification of the seniority of the striking employees was violative of Section 8 (3) and (1) of the Act.

"The right to strike is a legal, a constitutional right. It certainly is not a work-right nor a job-right. Indeed a strike is the direct opposite of work.

"The accrual of seniority is one of the incidents

of actual employment, no less than the wages received by the standby employee the denial of which wages to the striking employees the majority finds to be non-discriminatory. The principal value to an employer of an employee is his continued willingness to perform on the job, doing the work he is hired and paid to do. I cannot understand how an employee can earn credit for time during which he is required to be 'ready and willing to work' while he completely nullifies that condition by refusing to work.

"The Employer's practice of not here crediting seniority is not, in my opinion, to be considered as a penalty on the strikers. Rather, as in the case of loss of wages during the period in question, it is one of the economic risks assumed by the *employees who engaged in a strike not caused by unfair labor practices of their Employer*.

"I would, therefore, dismiss the complaint in its entirety." (Emphasis added).

The majority of the Board in the General Electric Case misconstrues the holding in the Mackay Radio Case (Supra) and the Act, as amended. When employees undertake a strike not caused by any unfair labor practice of their employer they assume the risks. They can enlist the aid of the Board for remedial purposes only. If they cannot seek the remedial aid of the Board then it can be said they, and not the employer, have severed or impaired their employment relationship with the employer. Such is the case before the Court.

The Supreme Court of the United States in the recent

case of *Aeronautical Lodge v. Campbell*, 337 U. S. 521, held that seniority rights derive their scope and significance from contracts and not from the mere fact of employment. Seniority rights are not independent and self-existing rights. At the time of the curtailment effecting Cloninger and Walters, the Board found the Master Working Agreement containing the seniority clause was in effect because it was being followed and not because it had been extended by agreement. (R. 39-40). The Board further found, and it was so stipulated, (R. 36; 247-249) that the Return-to-Work Policy and the seniority principles set out therein were likewise being maintained and followed during the same period of time. In other words, if there was a contractual basis covering seniority as contended by the Petitioner it encompassed the seniority provisions of the expired 1946 Master Agreement as modified by the memorandum of strike settlement and the Return-to-Work Policy. These reinstated the economic strikers without discrimination but with impaired seniority whether they be Cloninger and Walters, whether they be union or non-union employees instead of on a basis of "without discrimination and without loss of seniority".

There is a total failure of proof that the action of the Respondent was for the purpose or had the effect of encouraging or discouraging membership in the union in violation of Section 8 (a) (3) as required by *Stonewall Cotton Mills*. (Supra). There was no unfair labor practice by Respondent causing or prolonging the strike. Impairment of seniority was one of the risks assumed by the employees who engaged in a strike not caused by an unfair labor practice of the Respondent. The only parties re-

sponsible for the impairment of the employment relationship was the IWA-CIO Union and the employees who did not return to work to protect their seniority rights prior to the termination of the strike. It is not a question of whether the bargaining representative may lawfully waive statutory rights of the employees. It is a situation where the union was unable to negotiate full reinstatement of economic strikers. The Board erred in issuing a cease and desist order directed to the maintaining and giving effect to the seniority policy and practices set up under the Return-to-Work Policy of the Respondent and this Court should decline to enforce the order.

II.

The complaint should have been dismissed for the reason that it was issued on an alleged unfair labor practice occurring more than six months prior to the filing of the charge.

Section 10 (b) of the National Labor Relations Act reads as follows:

“(b) Whether it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided, That no complaint shall issue based upon any unfair labor practice occurring more*

than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C. title 28, Secs. 723-B, 723-C). (Emphasis supplied).

The facts in this case disclose that Respondent established and placed in effect the Return-to-Work Policy (R. 34-35) on October 13, 1947, the day following the strike settlement and it was so stipulated by all parties. (R. 34; 247-248).

The General Counsel in the footnotes of his Brief cites several cases in support of his position that continuation of the Return-to-Work Policy constitutes an unfair labor practice under the Act (Pages 31 and 32 of Petitioner's Brief). However, the cases do not support him. If the court will examine the cases cited it will find that the holding in all of them is to the effect that the National Labor Relations Board may consider events occurring prior to six months before filing the charge as background which imparts meaning to events occurring within the six months period.

As a matter of fact Respondent is upheld in the case of Superior Engraving Company vs. N.L.R.B. (C.A. 7) decided June 27, 1950, (26 LRRM 2351). On page 2356 Circuit Judge Lindley said:

"Examining the second amended charge in the light of our conclusion that the limitations period was operative with respect to all charges filed after the Act's effective date, it is evident that the allegations therein concerning petitioner's interrogation of its employees and its promises of benefits to such of them as would refuse to join or would withdraw from the Union, these acts having occurred 'since on or about October, 1943,' could not serve as the basis for the issuance of an unfair labor practice complaint in February, 1948, the date of the amendment of the Board's complaint herein."

The Board found the Union was aware of the Return-to-Work Policy shortly after the strike settlement (R. 37; 109-111, 144-147) and at least as early as December, 1947. The Petitioner then argues that the Board did not

find Respondent engaged in an unfair labor practice by inaugurating the policy but "by continuing to maintain it," (Petitioner's Brief 31) and that the discrimination was pursuant to a policy, rather than an isolated act. (Petitioner's Brief 33). The order of the Board is directed to the maintaining and giving effect to the Return-to-Work Policy only. (R. 80). That policy had been maintained since October 13, 1947, and acquiesced in by the Union and its local representatives since at least December, 1947. The reasons why it acquiesced to the application of the policy is immaterial. The admitted facts by the record show that it did for a period of some 14 months prior to the filing of the charge. Section 10 (b) of the Act is a substantive bar to the charge that the policy cannot now be maintained. It also should be pointed out that if the broad general order of the Board (Supra) is valid and enforceable by this Court an unfair labor practice to support such an order could have been filed as early as December, 1947. The statute had begun to run at least by that date. The Board erred in not dismissing the complaint based on a charge filed February 6, 1949, and amended March 18, 1949.

III.

The National Labor Relations Board erred in not dismissing the complaint for the reason that the bargaining agent, composed of four local unions and the International union, cannot have access to the processes of National Labor Relations Board when two of the local unions had not complied with Section 9 (f), (g) and (h) of the National Labor Relations Act, as amended.

Sections 9 (f), (g) and (h) of the Act provide:

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under sub-section (c) of this section, no petition under section 9 (e) (1) shall be entertained, and *no complaint shall be issued pursuant to a charge made by a labor organization* under sub-section (b) of section 10, *unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit* (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, title, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded \$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (a) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members

are required to pay in order to remain members in good standing of such labor organization;

“(6) a detailed statement of, or reference to provisions of its constitution and bylaws, showing the procedure followed with respect to (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

“(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursement made by it during such fiscal year, including the purposes for which made; and

“(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

“(g) It shall be the obligation of all labor organizations to file annually with the Secretary of

Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by sub-section (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in sub-section (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this sub-section.

“(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees raised by a labor organization under sub-section (c) of this section, no petition under section (9) (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under sub-section (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in and is not a member

of or support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

The General Counsel for the Petitioner in the opening of the proceedings before the Trial Examiner (R. 85) stated that "two of the four locals are not in compliance."⁴

The Counsel for the Respondent moved (R. 86) to dismiss the complaint on the grounds that the complaint did not allege compliance with Section 9 (f), (g) and (h), and, therefore the Board lacked jurisdiction.

This motion was later renewed (R. 336-337) and upon the further grounds that the Board must allege and prove compliance with such section and that the Board had not alleged or proven the fact of compliance but had, on the other hand, admitted that two locals of the Bargaining Unit actually were not in compliance.

The Trial Examiner in ruling on the motion said: (R. 86).

"Trial Examiner Leff: In other words, it is your contention that that is a jurisdictional requirement of the Act and it is incumbent upon the General Counsel both to plead and prove compliance?

"Mr. Elder: That is right.

⁴ In the footnote 17 on page 35 of Petitioner's Brief it is stated the Board's record show the two noncomplying locals subsequently complied. Respondent states that as late as July 11, 1950, in case 19-UA-2043 the petition of the Union was dismissed for failure of the Union to comply with the requirements of the Act, as amended.

"Trial Examiner Leff: I would have thought that there was considerable merit to your position except that the Board has ruled otherwise. I have had the matter up before and I know that the Board has ruled that it is an administrative matter.

"Mr. Merrick: It is an administrative matter.

"Trial Examiner Leff: That need not be pleaded or proved, consequently, I shall deny your motion. The record will show my denial of the motion. If you want to raise the matter in court, of course, you have an opportunity to do so."

The testimony and evidence in the proceeding show and Counsel for the Petitioner admits that the Bargaining Unit representing the employees of the Respondent consists of four local unions and the International. The collective bargaining agreement (G. C. Ex. 2, R. 94-95) provides in part as follows:

"This master agreement entered into effective this 1st day of April, 1946, between Potlatch Forests, Inc., hereinafter known as the Company, and Local No. 358, Pierce, Idaho; Local 361, Elk River, Idaho; Local 119, Coeur d'Alene, Idaho; and Local 364, Lewiston, Idaho, International Woodworkers of America, affiliated with the Congress of Industrial Organizations, hereinafter known as the *Union*. (Emphasis supplied).

"The Company recognizes the *Union* as the sole collective bargaining agency for its production and maintenance employees as certified by the National Labor Relations Board. It agrees to negotiate with a committee selected by these employees who are members of said International Woodworkers

of America, Local 358, Pierce; Local 361, Elk River; Local 119, Coeur d'Alene; and Local 364, Lewiston, their representatives or agents." (Emphasis supplied).

The Petitioner argues that Respondent fails to differentiate between a complaint issued under a charge of an unfair practice which prays for an order to cease and desist from discriminating against its employees and a complaint praying for an order for it to cease and desist from refusing to bargain; or a proceeding for certification of a non-complying union. The Examiner took the same position in support of his intermediate report and further stated that the question of compliance is a matter for administrative determination; it is not a litigable issue and need not be pleaded or proved. (R. 24-25, footnote 1).

There is no such distinction in the statute. As a matter of fact, Section 9 (h) quoted above is very clear when it says, "**** no complaint shall be issued pursuant to a charge made by a labor organization under sub-section (b) of section 10.****" (Sub-section (b) of Section 10 appears in full on page 41-42 of Petitioner's Brief).

In support of his position the Trial Examiner refers (R. 25) to the matter of the United Engineering Company, 84 NLRB 10, (24 LRRM 1213, 1214). On examining this case we find the complaint was based upon a charge signed by an individual, not a union. The Board in deciding that case found in effect that it was immaterial that the employee was a member of a non-complying union and the fact that the union might derive some benefit was immaterial. However, in the present case the union signed and filed the charge—Section 9 (f), (g) and (h) apply to unions not individuals.

Where the collective bargaining history shows that the collective bargaining agreements were entered into and signed on behalf of both the International and the local Unions, both must be in compliance with the act. Lynchburg Gas Company, 80 N.L.R.B. 184, 23 L.R.R.M. 1218, Magnolia Petroleum Company, 78 N.L.R.B. 163, 22 L.R.R.M. 1343.

In the recent case of Prudential Insurance Company of America, 81 N.L.R.B. 48, 23 L.R.R.M. 1331, the Board held that the participation of an International Union in an election was conditioned upon the full compliance with the Act by each of the respective local unions which individually or jointly with such International engaged in collective bargaining in behalf of the employer's industrial agent in the 31-state unit found appropriate for bargaining. The Board clarified this provision of its order in the following language quoted from that decision:

"Their (International Union) participation in the election, however, is conditioned upon the full compliance with Section 9 (f), (g) and (h) of the Act by *each of their* respective local unions which have members *among the employees of the Employer within the 31-State unit herein found appropriate.*

"Matter of United States Gypsum Company, 77 N.L.R.B. 1098 (22 LRRM 1127); Matter of Lane-Wells Company, 77 N.L.R.B. 1051 (22 LRRM 1114). Contrary to the assertion of our dissenting colleague, we believe that these cases stand for the proposition that, where there is in existence a local having members in the appropriate unit, its compliance is required without regard

to the extent to which it may participate in collective bargaining. *In any event, we believe that such a doctrine is required in order to effectuate the policy of Section 9 (f), (g) and (h) of the Act.*" (Emphasis supplied).

The U. S. Court of Appeals for the Fourth Circuit in the case of *N.L.R.B. v. Highland Park Mfg. Co.*, decided September 2, 1950, 26 LRRM 2531, was of the same opinion and held:

"We find no ambiguity in the language of the governing statute. On the contrary it provides as clearly as language can that the power of the Board may not be invoked by a labor organization unless there is on file the affidavits which the statute requires executed 'by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit'."

The U. S. Court of Appeals for the Fifth Circuit in the Case of *N.L.R.B. v. Postex Cotton Mills*, decided May 5, 1950, 26 LRRM 2116, said:

"The Act contains its own definition of a 'labor organization.' Section 2 (5) (29 USCA 152 (5) ... provides; 'The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work'."

The "labor organization" in the case at bar is the

"Union" as defined in the statute and described in the collective bargaining agreement supra. The only interested parties who could invoke the processes of the Board are individuals and the bargaining agent involved. The International Union and Local 10-364 are not interested parties except to the extent they are part of a constituent unit (the Union as described in the agreement) of the labor organization. Individuals did not file the charges. The bargaining agent did. The record shows it was not in compliance with the Act, as amended, and the complaint should be dismissed.

IV.

It is respectfully submitted that the Petition for the enforcement of the Order of the Board should be denied and dismissed for the reasons and upon the grounds that the complaint was issued in violation of Sections 9 (f), (g) and (h) and 10 (b) of the National Labor Relations Act, as amended, and on the further ground that the Return-to-Work Policy maintained by the Respondent does not violate Section 8 (a) (3) and (1) of the Act, as amended.

R. N. ELDER

ROB'T. H. ELDER

SIDNEY E. SMITH

Residence: Coeur d'Alene, Idaho

GEORGE W. BEARDMORE

Residence: Lewiston, Idaho

*Attorneys for Potlatch Forests, Inc.,
Respondent.*

October, 1950.

APPENDIX I

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. III, Secs. 151 et seq.), are as follows:

Sec. 2. When used in this Act—***.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute

RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organizations, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

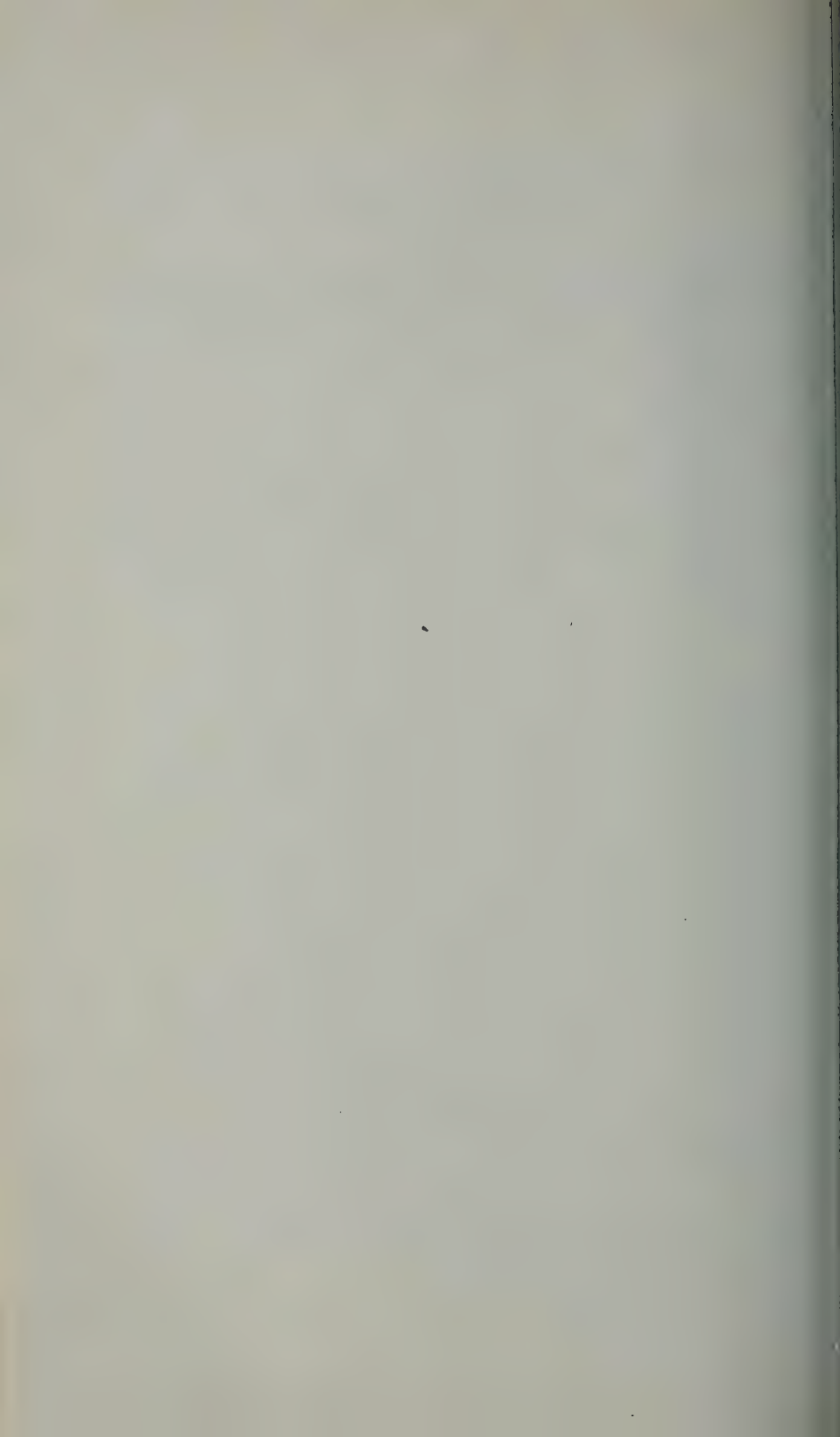
Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees

in the exercise of the rights guaranteed in Section 7; . . .

* * * * *

(3) By discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership in any labor organization.



No. 12534

United States
Court of Appeals
For the Ninth Circuit.

WINSTON CHURCHILL HENRY,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

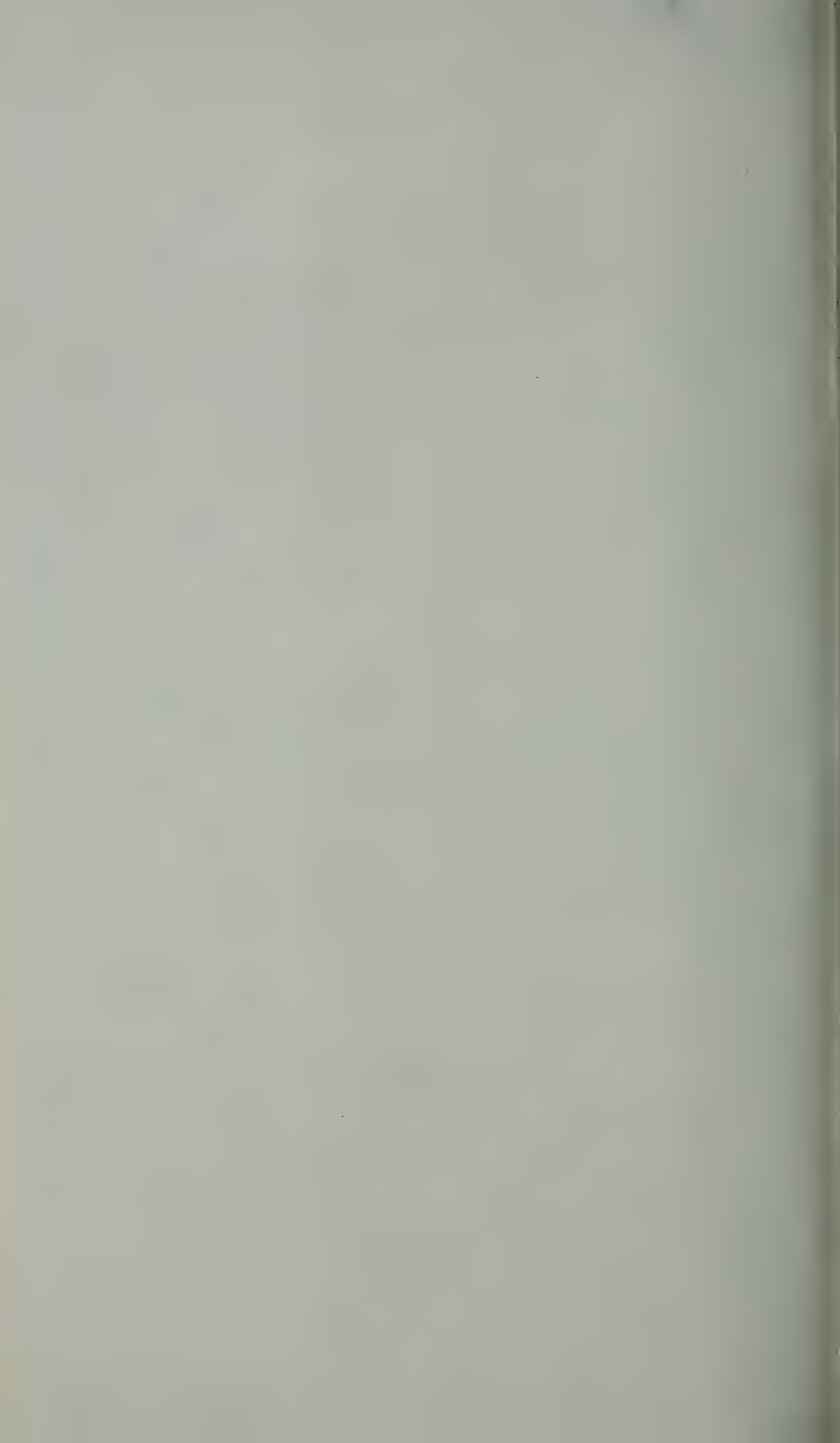
Transcript of Record

Appeal from the United States District Court,
District of Hawaii.

FILED

JUL 24 1950

PAUL P. O'BRIEN,



No. 12534

United States
Court of Appeals
For the Ninth Circuit.

WINSTON CHURCHILL HENRY,
Appellant,
vs.

UNITED STATES OF AMERICA,
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Transcript of Record

Appeal from the United States District Court,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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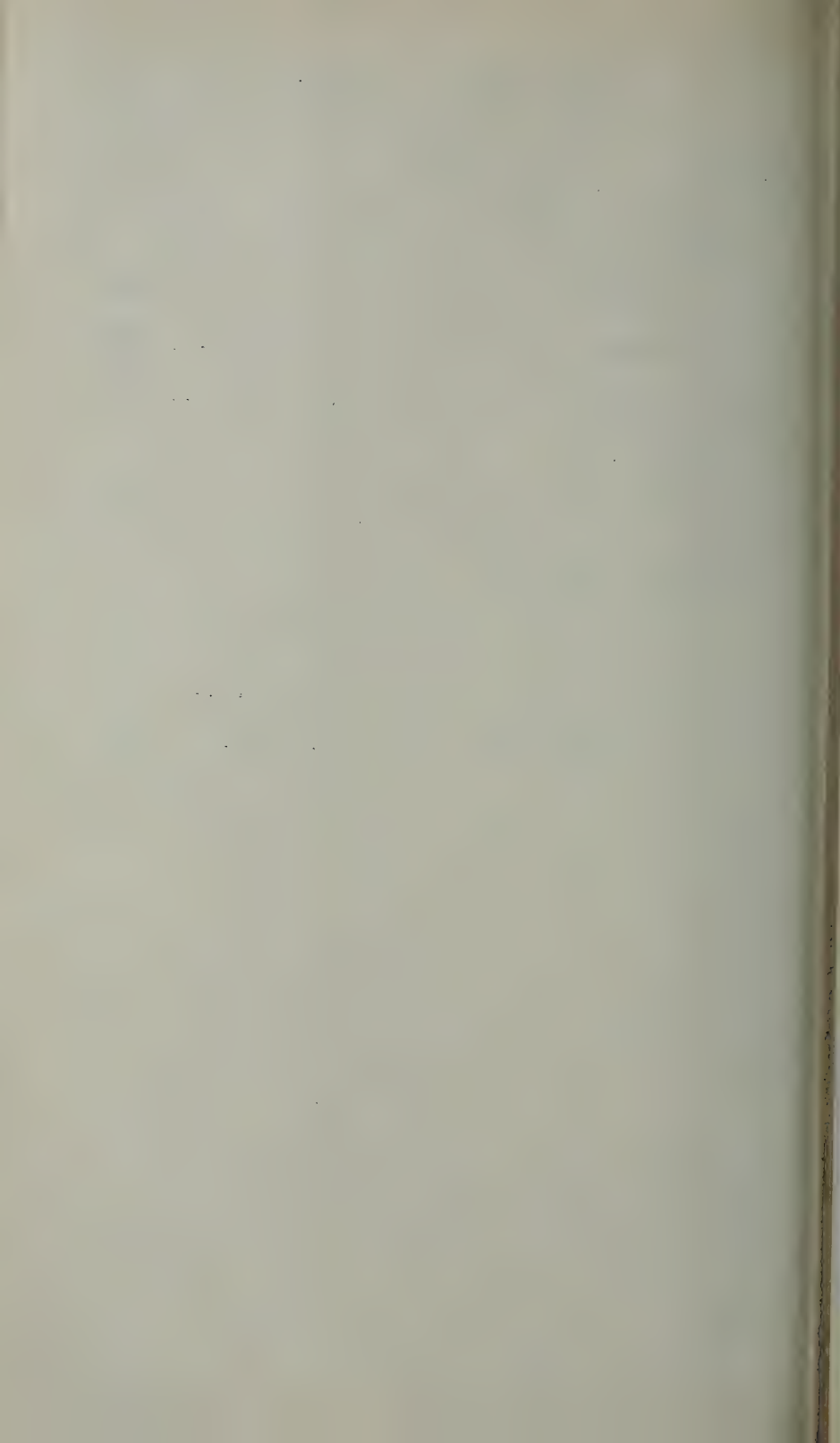
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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

UNITED STATES DISTRICT ATTORNEY, By
HOWARD K. HODDICK, ESQ., and
NAT RICHARDSON, JR., ESQ.,

Assistant United States
District Attorneys,
Honolulu, T. H.

For the Plaintiff,
United States of America.

LANDAU and FAIRBANKS, By
SAMUEL LANDAU, ESQ.,

301 McCandless Building,
Honolulu, T. H.,

O. P. SOARES, ESQ.,

Union Trust Building,
Honolulu, T. H.,

For the Defendant,
Winston Churchill Henry.

In the United States District Court for the
District of Hawaii

Cr. No. 10,253

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WINSTON CHURCHILL HENRY,

Defendant.

INDICTMENT

(26 U.S.C. Section 2593)

(26 U.S.C. Section 2553(a))

Count I.

The Grand Jury Charges:

That on or about the 16th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Winston Churchill Henry, alias "Frisco Shorty," did knowingly, wilfully, unlawfully and feloniously purchase a salt, compound and derivative of opium, to wit, 946 capsules, each containing heroin, and a derivative of coca leaves, to wit, 250 grains of cocaine, which heroin and cocaine was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), Title 26, United States Code.

Count II.

The Grand Jury Further Charges:

That on or about the 16th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Winston Churchill Henry, alias "Frisco Shorty," the identical person named in Count I of this Indictment, being then and there a transferee required to pay the transfer tax imposed by Section 2590(a), Title 26, United States Code, did knowingly, wilfully, unlawfully and feloniously acquire and otherwise obtain a quantity of marihuana, to wit, 787 grains of bulk marihuana and 35 marihuana cigarettes without having paid such tax in violation of Section 2593, Title 26, United States Code.

Dated: Honolulu, T. H., this 15th day of September, 1949.

A True Bill.

/s/ HERMAN L. NICKET,
Foreman, Grand Jury.

/s/ RAY J. O'BRIEN,
United States Attorney.

I hereby order a Bench Warrant to issue forthwith on the within Indictment for the arrest of the defendant named therein, bail being fixed at \$.

/s/ D. E. METZGER,
Judge, United States District Court for the District of Hawaii.

Presented in open Court by the Grand Jury on
Sept. 15, 1949.

/s/ WM. F. THOMPSON, JR.,
Clerk.

[Endorsed]: Filed Sept. 15, 1949.

[Title of Court and Cause.]

MINUTE ORDER

Wednesday, September 28, 1949

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant herein with Mr. Samuel Landau, his counsel. This case was called for hearing on motion for bill of particulars.

Following argument by respective counsel, the Court ordered that this case be continued to October 5, 1949, at 10 a.m. for further consideration and presentation of additional authorities by respective counsel.

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

Comes now defendant Winston Churchill Henry, by his attorneys, Landau & Fairbanks, and moves and demands that the United States of America furnish him with a bill of particulars of the matters set forth in the indictment on file herein, especially the matters hereinafter set forth:

As to Count I.

The time, place and circumstances of the alleged purchase and the person from whom the defendant is alleged to have purchased the articles mentioned in said Count I.

As to Count II.

1. How and in what manner the defendant became a transferee required to pay the special tax imposed by Section 2590(a), Title 26, United States Code.

2. The time, place and circumstances under which the defendant became a transferee required to pay the special tax imposed by Section 2590(a), Title 26, United States Code.

3. The time, place and circumstances at and under which the defendant is alleged to have "acquired and otherwise obtained" the quantity of marihuana.

4. Whether the defendant "acquired" or "other-

wise obtained" the alleged marihuana, and if the latter, how the defendant is alleged to have "otherwise obtained" said marihuana.

Wherefore, defendant through his attorneys prays that this motion be granted and a bill of particulars be furnished him in accordance with this request.

Dated: Honolulu, T. H., this 26th day of September, 1949.

WINSTON CHURCHILL

HENRY,

Defendant.

By LANDAU & FAIRBANKS,

His Attorneys.

By /s/ SAMUEL LANDAU.

AFFIDAVIT OF SAMUEL LANDAU

Territory of Hawaii,

City and County of Honolulu—ss.

Samuel Landau, being first duly sworn, on oath deposes and says:

That he is a member of the firm of Landau & Fairbanks, the attorneys for the defendant above-named; that he has read Counts I and II of the indictment herein and cannot understand from said Counts exactly what the defendant is charged with having done that constituted the violation of the law; that it is impossible for your affiant to advise the defendant how to plead to these Counts and

that it is necessary, in order to properly prepare a defense, that he be more fully informed of the nature and the cause of the accusations against the defendant, and it is necessary for him to be informed with more particularity as to the matters and things in said Counts and which are requested in the foregoing motion for a bill of particulars.

That the defendant cannot safely go to trial without receiving the information requested in the said motion.

/s/ SAMUEL LAUDAU.

Subscribed and sworn to before me this 27th day of September, 1949.

/s/ [Indistinguishable.]

Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission expires Mar. 1, 1950.

[Endorsed]: Filed Sept. 27, 1949.

[Title of Court and Cause.]

MINUTE ORDER

Wednesday, October 5, 1949

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant herein with Mr. Samuel Landau, his counsel. This case was called for further hearing on motion for bill of particulars.

The Court ordered that this case be continued to October 7, 1949, at 10 a.m. for hearing.

[Title of Court and Cause.]

MINUTE ORDER

Friday, October 7, 1949

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came Mr. Samuel Landau, counsel for the defendant herein. This case was called for decision on motion for bill of particulars.

Motion for bill of particulars was denied by the Court, and exceptions were allowed the defendant.

The Court ordered that this case be continued to October 10, 1949, at 9 a.m. for plea.

[Title of District Court and Cause.]

MOTION TO TRANSFER CASE FROM THE DISTRICT OF HAWAII

Comes now Winston Churchill Henry, defendant above named, by his attorneys, Landau & Fairbanks and O. P. Soares, and hereby moves this Honorable Court to transfer these proceedings to the United States District Court, Northern District of California, Southern Division, for the reason that there exists in this district so great a prejudice against him that he cannot obtain a fair and impartial trial in this district.

This motion is based upon the affidavit of the defendant herein and upon the evidence to be adduced at the time of hearing.

Dated: Honolulu, T. H., October 25, 1949.

WINSTON CHURCHILL
HENRY,
Defendant.

By LANDAU & FAIRBANKS and
O. P. SOARES,
His Attorneys.

By /s/ SAMUEL LANDAU.

NOTICE

To: Ray J. O'Brien, United States Attorney, District of Hawaii, Attorney for Plaintiff:

Please take notice that the foregoing motion will be presented to the Honorable J. Frank McLaughlin on Tuesday, the 1st day of November, 1949, at 2:00 o'clock p.m.

Dated: Honolulu, T. H., October 25, 1949.

LANDAU & FAIRBANKS and
O. P. SOARES,
Attorneys for Defendant.

By /s/ SAMUEL LANDAU.

AFFIDAVIT

Territory of Hawaii,
City and County of Honolulu—ss.

Winston Churchill Henry, being first duly sworn,
on oath deposes and says:

That on many occasions since he was indicted, the two main newspapers having wide general circulation in the Territory of Hawaii have published articles concerning him, commenting unfavorably and prejudicially upon him; that the Honolulu Star-Bulletin, with a claimed daily circulation of approximately 80,000, published among other things a purported criminal record of your affiant, listing therein certain offenses with which your affiant was charged but not convicted of, a copy of which will be introduced at the hearing of this motion; that the said newspaper, upon a recent acquittal, headlined an article concerning the case with the phrase "Henry Beats the Rap—Again," a copy of which will be introduced at the hearing of this motion; that the Honolulu Advertiser, with a claimed daily circulation of approximately 35,000, published among other things an editorial concerning your affiant, commenting prejudicially upon your affiant; that said articles and others have caused the populace of the Territory of Hawaii to become inflamed against your affiant, and no jury picked from the citizenry of the Territory of Hawaii would be able to act in a fair and impartial manner; that because of the notoriety created by the

said newspapers, any activity of your affiant is publicized far beyond its importance and ordinary news interest; that as a result of the inflammation of public opinion by the said newspapers, citizens of the Territory of Hawaii have made comments indicating quite clearly the temper of the people and their prejudice against him, and that affiant could not get a fair and impartial trial.

Further affiant sayeth not.

/s/ WINSTON CHURCHILL
HENRY.

Subscribed and sworn to before me this 25th day of October, 1949.

/s/ [Indistinguishable.]

Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires Mar. 1, 1950.

[Endorsed]: Filed Oct. 26, 1949.

MINUTE ORDER

Criminal No. 10,253

UNITED STATES OF AMERICA,

vs.

WINSTON CHURCHILL HENRY.

Criminal No. 10,254

UNITED STATES OF AMERICA,

vs.

WINSTON CHURCHILL HENRY, alias
"FRISCO SHORTY"; and KERSHAW
WESTON.

Tuesday, November 1, 1949

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant Henry with Mr. Samuel Landau, Mr. O. P. Soares, and Mr. W. Z. Fairbanks, his counsel. These cases were called for hearing on motions to transfer case from the District of Hawaii.

Upon request of Mr. Landau, the Court ordered that these cases be continued to November 9, 1949, at 2 p.m. for hearing.

[Title of District Court and Causes.]

MINUTE ORDER

Wednesday, November 9, 1949

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant Henry with Mr. Samuel Landau, his counsel. These cases were called for hearing on motions to transfer case from the District of Hawaii.

At 2:45 p.m., Mr. Fred Howard, civil service employee, United States Army, was called and sworn and testified on behalf of the defendant.

The witness was withdrawn from the witness stand and his testimony was stricken.

At 3:20 p.m., Mr. Thomas Lampley, employee, Honolulu Gas Company, was called and testified on behalf of the defendant.

Mr. Richard R. Williams, Reporter, Honolulu Honolulu Gas Company, was called and sworn and testified on behalf of the defendant.

Newspaper article appearing in the Honolulu Star-Bulletin, September 21, 1949, was admitted in evidence as Defendant's Exhibit No. 1, marked and ordered filed.

Newspaper article appearing in the Honolulu Star-Bulletin, October 19, 1949, was admitted in evidence as Defendant's Exhibit No. 2, marked and ordered filed.

Newspaper article appearing in the Honolulu Star-Bulletin, July 21, 1949, was admitted in evi-

dence as Defendant's Exhibit No. 3, marked and ordered filed.

Newspaper article appearing in the Honolulu Star-Bulletin, September 27, 1949, was admitted in evidence as Defendant's Exhibit No. 4, marked and ordered filed.

Newspaper article appearing in the Honolulu Star-Bulletin, October 6, 1949, was admitted in evidence as Defendant's Exhibit No. 5, marked and ordered filed.

At 3:50 p.m., Mr. Jack M. Fox, Reporter, Honolulu Advertiser, was called and sworn and testified on behalf of the defendant.

Newspaper article appearing in the Honolulu Advertiser, August 10, 1949, was admitted in evidence as Defendant's Exhibit No. 6, marked and ordered filed.

Newspaper article appearing in the Honolulu Advertiser, September 28, 1949, was admitted in evidence as Defendant's Exhibit No. 7, marked and ordered filed.

Newspaper article appearing in the Honolulu Advertiser, October 16, 1949, was admitted in evidence as Defendant's Exhibit No. 8, marked and ordered filed.

Newspaper article appearing in the Honolulu Advertiser, November 8, 1949, was admitted in evidence as Defendant's Exhibit No. 9, marked and ordered filed.

At 3:55 p.m., the Court ordered that these cases be continued to November 10, 1949, at 2 p.m. for further hearing.

[Title of District Court and Cause.]

MINUTE ORDER

Thursday, November 10, 1949

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant Henry with Mr. Samuel Landau, his counsel. These cases were called for further hearing on motions to transfer case from the District of Hawaii.

At 2:10 p.m., Mr. Arthur McGraw, businessman, was called and sworn and testified on behalf of the defendant.

At 2:30 p.m., the defendant Henry was called and sworn and testified on his own behalf.

At 2:36 p.m., Miss Mary Noonan, Secretary, Republican Club of Hawaii, was called and sworn and testified on behalf of the defendant.

At 3:15 p.m., the defense rested.

At 3:18 p.m., Mr. Nelson B. Lansing, real estate salesman, was called and sworn and testified on behalf of the United States.

At 3:31 p.m., Mr. Byron Kent Murphy, real estate broker, was called and sworn and testified on behalf of the United States.

The government then rested.

At 3:40 p.m., Mr. Edward Berman, attorney-at-law, was called and sworn and testified on behalf of the defendant.

At 3:50 p.m., argument was had by Mr. Landau.

At 4:18 p.m., argument was had by Mr. Hoddick, followed at 4:30 p.m., by Mr. Landau in his closing argument.

At 4:45 p.m., the Court denied said motions without prejudice.

The Court then ordered that Criminal No. 10,-253 be set for trial on January 3, 1950, at 9 a.m., and that all motions that are to be filed shall be disposed of prior to that time.

[Title of Court and Cause.]

MINUTE ORDER

Wednesday, January 4, 1950

On this day came Mr. Howard K. Hoddick and Mr. Nat Richardson, Jr., Assistant United States District Attorneys, and also came the defendant herein with Mr. Samuel Landau, Mr. W. Z. Fairbanks, and Mr. O. P. Soares, his counsel. This case was called for trial.

At 3:19 p.m., the following jurors were duly empaneled and sworn to try the issues herein:

Cornelius Mulder	Thomas K. Cook
Francis N. Todd	Leo F. Andre
Louis A. Wills	Herbert B. Webb
William H. Kruse	John M. H. Kramer
Ralph H. Moyers	Howard F. Mosher
George E. Richardson	Edgard Kina

At 3:25 p.m., the Court ordered that this case be continued to January 5, 1950, at 10 a.m. for further trial.

[Title of Court and Cause.]

MINUTE ORDER

Thursday, January 5, 1950

On this day came Mr. Howard K. Hoddick and Mr. Nat Richardson, Jr., Assistant United States

District Attorneys, and also came the defendant herein with Mr. Samuel Landau and Mr. O. P. Soares, his counsel. This case was called for further trial.

It was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

At 10:06 a.m., Sgt. Richard Sasaki, Honolulu Police Department, was called and sworn and testified on behalf of the United States.

One bottle containing filled capsules was marked for identification as United States No. 1.

One photograph showing Sgt. Sasaki was marked for identification as United States No. 2, and was admitted in evidence as United States Exhibit "A," marked and ordered filed.

Mr. Roy F. Case, Police Officer, Honolulu Police Department, was called and sworn and testified on behalf of the United States.

At 12 noon, the Court ordered that this case be continued to 2 p.m. this day for further trial.

At 2 p.m., the witness Case resumed the witness stand and testified further.

Two photographs of a sun couch were marked for identification as United States Nos. 3 and 4, and were admitted in evidence as United States Exhibits "B" and "C," marked and ordered filed.

One small bottle was marked for identification as United States No. 5.

At 3:05 p.m., Mr. Francis C. Ferry, Police Officer, Honolulu Police Department, was called and

sworn and testified on behalf of the United States.

One box was marked for identification as United States No. 6.

A paper bag was marked for identification as United States No. 7.

At 3:38 p.m., Mr. Harry L. Pestana, Police Officer, Honolulu Police Department, was called and sworn and testified on behalf of the United States.

An envelope containing three cigarettes wrapped in brown paper was marked for identification as United States No. 8.

Three cigarettes wrapped in white paper were marked for identification as United States No. 9.

At 4:02 p.m., the Court ordered that this case be continued to January 6, 1950, at 10 a.m. for further trial.

[Title of Court and Cause.]

MINUTE ORDER

Friday, January 6, 1950

On this day came Mr. Howard K. Hoddick and Mr. Nat Richardson, Jr., Assistant United States District Attorneys, and also came the defendant herein with Mr. Samuel Landau and Mr. O. P. Soares, his counsel. This case was called for further trial.

It was stipulated by respective counsel that the

jury heretofore empaneled and sworn to try the issues herein was present.

At 10:05 a.m., the witness Pestana resumed the witness stand and testified further.

At 10:25 a.m., Mr. Paul Schaffer, Police Officer, Honolulu Police Department, was called and sworn and was withdrawn without testifying.

At 10:30 a.m., Mr. William K. Wells, Acting Supervisor, Bureau of Narcotics, was called and sworn and testified on behalf of the United States.

Photograph showing a portion of the premises was marked for identification as United States No. 10.

At 11:10 a.m., the jury was excused from the courtroom, and at 11:22 a.m., the witness Wells was withdrawn from the witness stand.

The jury was summoned, and at 11:24 a.m., Mr. Gilbert J. Carr, Chemist, United States Customs Service, was called and sworn and testified on behalf of the United States.

At 11:47 a.m., the Court ordered that this case be continued to 2 p.m. this day for further trial.

At 2:05 p.m., the witness Carr resumed the witness stand and testified further.

United States No. 1 for identification was admitted in evidence as United States Exhibit "D," marked and ordered filed.

United States No. 5 for identification was admitted in evidence as United States Exhibit "E," marked and ordered filed.

United States No. 7 for identification was ad-

mitted in evidence as United States Exhibit "F," marked and ordered filed.

United States No. 8 for identification was admitted in evidence as United States Exhibit "G," marked and ordered filed.

United States No. 9 for identification was admitted in evidence as United States Exhibit "H," marked and ordered filed.

United States No. 6 for identification was admitted in evidence as United States Exhibit "I," marked and ordered filed.

At 2:22 p.m., Mr. Howard A. Patterson, Deputy Collector of Internal Revenue, was called and sworn and testified on behalf of the United States.

At 2:29 p.m., Mr. Theodore P. Kinney, Police Officer, Honolulu Police Department, was called and sworn and testified on behalf of the United States.

At 2:47 p.m., the government rested.

At 3:10 p.m., the Court ordered that this case be continued to January 9, 1950, at 10 a.m. for further trial.

[Title of Court and Cause.]

MINUTE ORDER

Monday, January 9, 1950

On this day came Mr. Howard K. Hoddick and Mr. Nat Richardson, Jr., Assistant United States District Attorneys, and also came the defendant herein with Mr. Samuel Landau and Mr. O. P.

Soares, his counsel. This case was called for further trial.

It was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

At 10:18 a.m., motion for mistrial was made by Mr. Landau, and was denied by the Court.

At 10:26 a.m., the witness Carr was recalled to the witness stand and testified further.

At 10:27 a.m., the government rested.

Motions were made by Mr. Landau to strike the testimony of all the government witnesses and also to strike certain portions of the testimony of certain witnesses, and for a directed verdict as to Counts I and II.

At 10:35 a.m., the jury was excused until 2 p.m. this day.

Argument was then had by Mr. Landau and Mr. Hoddick on each motion to strike.

Motions to strike were denied by the Court.

At 11:52 a.m., argument was had by Mr. Landau and Mr. Hoddick on each motion for directed verdict.

At 12:32 p.m., the Court ordered that this case be continued to 1:30 p.m. this day for further argument.

At 1:32 p.m., argument was continued.

Motions for directed verdict were denied by the Court.

At 2:45 p.m., the jury was summoned and was advised by the Court that motions to strike and for directed verdict were denied.

At 2:50 p.m., Mrs. Agnes L. Kellett, Record Custodian, Rent Control, City and County of Honolulu, was called and sworn and testified on behalf of the defendant.

At 2:55 p.m., the defendant rested.

The jury was then excused until January 10, 1950, at 1:30 p.m., and the matter of settling instructions were taken up in chambers.

At 4:10 p.m., the Court ordered that this case be continued to January 10 at 9 a.m. for further settling of instructions.

[Title of Court and Cause.]

MINUTE ORDER

Tuesday, January 10, 1950

On this day came Mr. Howard K. Hoddick and Mr. Nat Richardson, Jr., Assistant United States District Attorneys, and also came Mr. Samuel Landau and Mr. O. P. Soares, counsel for the defendant herein.

At 9 a.m., the further settlement of instructions was taken up in chambers.

At 11:50 a.m., the Court ordered that this case be continued to 1:30 p.m., this day for further settlement of instructions.

At 2 p.m., this case was called for further trial. The defendant was present.

It was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

Opening argument was had by Mr. Hoddick.

At 2:18 p.m., argument was had by Mr. Soares, followed at 3:22 p.m., by Mr. Hoddick in his closing argument.

At 3:30 p.m., the Court instructed the jury.

At 4:30 p.m., the jury was excused and Mr. Landau excepted to the Court's refusal to give Defendant's Requested Instructions Nos. 1, 2, 3, 6, and 8 and to the Court's giving United States Instructions Nos. 9 and 10.

At 4:35 p.m., the jury was summoned, and Mr. Otto F. Heine, and Mr. George E. Bruns, United States Marshal and Deputy United States Marshal, respectively, were sworn as bailiffs to take charge of the jury during its deliberations.

At 5:45 p.m., upon request of the jury through its foreman, Mr. Leo F. Andre, the Court further instructed the jurors on the matter of "possession."

At 6 p.m., the Court ordered the jury to retire to deliberate further after Mr. Landau had excepted to the giving of the instruction requested by the jury.

At 6:10 p.m., the jury left for dinner, returning at 7:55 p.m., to deliberate further.

At 10:50 p.m., the jury requested, in the presence of respective counsel and the defendant, that they retire for the night and that they be furnished with a transcript of the Court's instructions.

The Court allowed the jury to retire for the night and continued the matter of instructions until January 11, 1950, at 9 a.m.

Upon request of Mr. Heine, the Court ordered that Mr. Thomas R. Clark, Deputy United States Marshal, be sworn as bailiff herein to take charge of the jury during its deliberations.

[Title of Court and Cause.]

MINUTE ORDER

Wednesday, January 11, 1950

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant herein with Mr. Samuel Landau and Mr. O. P. Soares, his counsel. This case was called for further trial.

It was stipulated by respective counsel that the jury heretofore empaneled and sworn to try the issues herein was present.

At 9:12 a.m., the Court outlined various portions of the evidence to the jury, following which the jury was instructed to retire and deliberate further. Mr. Landau objected to the instructions given by the Court.

At 3:40 p.m., the jury, in the presence of respective counsel and the defendant, requested that they be allowed to view the premises and that they be furnished a copy of the transcript of testimony.

At 3:45 p.m., the Court, jury, counsel, clerk, and court reporter proceeded to view the premises at 803-807 Hausten Street, returning at 5:10 p.m.

Testimony of the witnesses Sasaki, Case, and Wells, was read to the jury by the court reporter.

At 7:07 p.m., the jury retired for the night.

[Title of Court and Cause.]

MINUTE ORDER

Thursday, January 12, 1950

At 10 a.m., on this day after having retired for the night in custody of the bailiffs, the jury returned to the courtroom to deliberate further upon a verdict in this case.

At 2:45 p.m., the jury appeared and in the presence of respective counsel and the defendant and through their foreman returned the following verdict of guilty which was ordered to be placed on file.

Cr. No. 10,253

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WINSTON CHURCHILL HENRY,

Defendant,

VERDICT

(2553(a) U.S.C. Title 26)

(2593 U.S.C. Title 26)

As to Count I of the Indictment, we, the Jury, duly empaneled and sworn in the above-entitled cause, do hereby find the Defendant, Winston Churchill Henry Guilty.

As to Count II of the Indictment, we, the Jury, duly empaneled and sworn in the above-entitled

cause, do hereby find the Defendant, Winston Churchill Henry Guilty.

Dated: Honolulu, T. H., this 12th day of January, 1950.

(s) LEO F. ANDRE,
Foreman.

Upon request of Mr. Landau, the jury was polled by the Court as to the verdict returned, the verdict being confirmed by each juror.

Mr. Landau excepted to the verdict and gave notice of motion for a new trial.

The jurors were then excused by the Court.

Upon request of Mr. Hoddick, bond was increased to \$2,500.00, to be posted by 4 p.m., January 13, 1950.

The Court ordered that this case be continued to January 26, 1950, at 10 a.m., for pre-sentence investigation and sentence.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Comes now defendant, Winston Churchill Henry, by his attorneys, Landau & Fairbanks and O. P. Soares, and respectfully moves the above-entitled Court for a new trial upon the grounds:

1. That the verdict rendered in said cause on January 12, 1950, is contrary to the law, contrary

to the evidence, and contrary to the weight of the evidence.

2. That there was no proof amounting to more than a mere scintilla of evidence and no proof beyond a reasonable doubt that the defendant committed the offenses alleged in the indictment and that the jury in rendering the verdict of guilty was in error.

3. That the Court erred in failing to grant defendant's motions for directed verdicts as to Counts I and II and both Counts generally for the reasons heretofore stated in the record and by reference made a part hereof.

4. That the Court erred in denying the motion to strike the testimony of witnesses relating to the acts of and conversations with the defendant that were incriminatory in nature for the reason that at the time of the search and investigation thereafter the defendant was then under an illegal arrest, and there could be no presumption that his acts and words were free and voluntary, but on the contrary the presumption was that the defendant was under duress and compulsion.

5. That the Court erred in denying the motion to strike the testimony of Officer Kinney with reference to his testimony about a conversation between the witness and the defendant at the vice squad room on July 16, 1949, at or about 4:45 p.m., wherein the defendant was alleged to have stated that he was responsible for everything at 803 Haus-

ten Street, for the reason that, as the witness testified, he was then conducting an investigation concerning certain guns and the questions put to the defendant and the defendant's answers thereto related specifically to these guns and hence could have no possible bearing on or admissible as an admission in this case or to any matter which was not then under investigation by the witness.

6. That the Court erred in denying the motion to strike the testimony of the witness, H. A. Patterson, concerning the making of a demand of the defendant for the production of certain forms on September 27, 1949, and giving him until September 30, 1949, to produce them for the reason that the demand was made after the indictment was returned against the defendant by the grand jury, and even though the witness may not have known that an indictment had in fact been previously brought against the defendant the said demand was made at the request of and in the presence of Mr. Wells, the Acting Narcotic Chief in the Territory of Hawaii, who knew that the indictment had been returned; for the further reason that at the trial of the case the only evidence of the nonpayment of the tax was the witness's testimony which was not and could not have been available to the grand jury and, therefore, at the time of the indictment there was no evidence of any violation of the law; and further that the time given by the witness to the defendant to produce the forms was not reasonable under the circumstances and

the demand, having come after the return of the indictment, was, in effect, requiring the defendant to give testimony against himself; and for the further reason that the evidence was silent as to any information given to the defendant by the witness as to the law and the requirement thereof that such form must be produced upon request or the effect of such failure to produce the forms.

7. That the only evidence of possession which was introduced by the United States were the alleged admissions, by word or by acts, of the defendant that he was in possession directly or constructively; that this in effect permitted the proof of the corpus delicti by the alleged admissions of the defendant; that the corpus delicti should have been proven by evidence outside and beyond the alleged admissions.

8. That the Court erred in refusing to give the defendant's requested instructions Nos. 1, 2, 3, 6 and 8, and the giving of the Government's instructions Nos. 9 and 10 for the reasons heretofore stated in the record and by reference made a part hereof.

9. That the Court erred in discussing and telling the jury during its deliberations what the Government relied upon and what the defendant relied upon as a defense when the jury merely requested instructions as to the law and not comment or argument on the evidence.

10. That the Court erred in making any comments or discussions on the evidence while the jury was in deliberation on the facts.

11. That the Court erred in giving the statement of law as to possession which referred only to civil possession and not possession as used in the criminal statute, and that the examples given by the Court to the jury on the question of what constituted possession were ambiguous and misleading.

12. That the Court erred in commenting upon the evidence while the jury was in deliberation for the further reason that the said comments were not full and fair but were in fact ambiguous, misleading and argumentative, and the use of the blackboard in the manner in which it was used by the Court in setting up the various elements of the Government's case and then setting up four elements, only one of which was evidential in nature on the defense, could have no result but to show to the jury that in the Court's mind the evidence of the Government was overwhelming.

13. That the Court erred in denying the defendant's motion for a mistrial for the reason that the article in the Honolulu Advertiser of Sunday, January 8, 1950, directly linked the defendant up with another alleged narcotic violation and had been in fact read by at least one juror.

Dated: Honolulu, T. H., this 21st day of January, 1950.

WINSTON CHURCHILL
HENRY,

Defendant.

By LANDAU & FAIRBANKS and
O. P. SOARES,

His Attorneys.

By /s/ SAMUEL LANDAU.

Service of Copy admitted.

[Endorsed]: Filed January 23, 1950.

District Court of the United States
for the District of Hawaii

No. 10,253

UNITED STATES OF AMERICA

vs.

WINSTON CHURCHILL HENRY

JUDGMENT AND COMMITMENT

On this 26th day of January, 1950, came the attorney for the Government and the defendant appeared in person and by counsel; Samuel Landau, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of

guilty by the jury, of the offense of knowingly, wilfully, unlawfully and feloniously purchasing a salt, compound and derivative of opium, to wit, 946 capsules, each containing heroin, and a derivative of coca leaves, to wit, 250 grains of cocaine, which heroin and cocaine was not then and there in the original stamped package, and knowingly, wilfully, unlawfully and feloniously acquiring and otherwise obtaining a quantity of marihuana, to wit, 787 grains of bulk marihuana and 35 marihuana cigarettes without having paid tax as charged in Counts I and II of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of:

Count I —Four (4) years and to pay a fine of \$1,000.00;

Count II—Two (2) years and to pay a fine of \$1,000.00;

Sentences of imprisonment to run consecutively;

Defendant is to be further imprisoned until payment of the fines, or until he is otherwise discharged as provided by law.

It Is Ordered that the Clerk deliver a certified

copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ J. FRANK McLAUGHLIN,

United States District Judge.

By /s/ WM. F. THOMPSON, JR.,

Clerk.

[Title of Court and Cause.]

MINUTE ORDER

Thursday, January 26, 1950

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came Mr. Samuel M. Landau, counsel for the defendant herein. This case was called for hearing on motion for new trial.

Following argument by respective counsel, motion for new trial was denied by the Court. Exceptions were allowed the defendant.

At 2:12 p.m., there being present Mr. Hoddick and the defendant with Mr. Landau, his counsel, this case was called for sentence.

Upon request of Mr. Landau, the Court allowed the defendant and his counsel to read the presentence report.

Upon the verdict of guilty, the Court adjudged the defendant guilty as charged in the Indictment and ordered the defendant committed to the custody

of the Attorney General for placement for a period of Four Years and to pay a fine of \$1,000.00, as to Count I, and for a period of Two Years and to pay a fine of \$1,000.00 as to Count II of the Indictment, sentences of imprisonment to run consecutively and in default of payment of fine to stand committed until otherwise discharged.

Mr. Landau gave notice of appeal and requested that the defendant be released pending the filing of a supersedeas bond.

Upon further request of Mr. Landau, the Court ordered mittimus stayed to 12, January 27, 1950, with the consent of the bondsman.

INSTRUCTION No. 4

You are instructed that as to Count I the defendant is charged with knowingly, wilfully, unlawfully and feloniously purchasing a salt, compound and derivative of opium, and the Government must prove beyond all reasonable doubt all of the material allegations in said Count. Those material allegations are: A—admitted items in evidence are narcotics. (1) that the items mentioned in the Count were not at the time of the purchase in the original stamped package and further that they were not from the original stamped package; (2) that the defendant did in fact purchase on or about July 16, 1949, the items listed in Count I. If you have a reasonable doubt as to any of the above material

allegations, you must acquit the defendant as to Count I.

Given.

/s/ J. F. Mc.

Operation of presumption of guilt under statute arising from fact of unexplained possession.

INSTRUCTION No. 5

You are instructed that as to the charge in Count I the statute states in effect that the "absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found." This means that before this theory can be considered by you, you must first find beyond all reasonable doubt that there was an absence of appropriate tax-paid stamps and, secondly, that the defendant was in possession of them at the time that they were found. If you have a reasonable doubt as to either of these matters, you must acquit the defendant for the reason that there is no evidence of a direct purchase by the defendant.

Given.

/s/ J. F. Mc.

INSTRUCTION No. 7

You are instructed that as to Count II the defendant is charged with being a transferee required to pay the tax imposed by law and acquiring and otherwise obtaining the articles mentioned therein without having paid such tax, and the Government must prove beyond all reasonable doubt that the defendant was in fact a transferee of the articles mentioned therein and was, therefore, required to pay the transfer tax. If you have a reasonable doubt as to the allegation that he was a transferee, you must acquit the defendant.

Given.

/s/ J. F Mc.

(Plus inst. re presumption.)

INSTRUCTION No. 8

You are instructed, gentlemen of the jury, that a person under arrest has a constitutional privilege not to make any statements and his failure to make a statement cannot be considered by you as evidence in arriving at your verdict, nor can his silence or lack of denial of an accusation made to him or in his presence be considered by you in any manner in arriving at a verdict against him.

Given.

/s/ J. F Mc.

INSTRUCTION No. 9

Possession means control of a thing to the exclusion of any other person having no better claim to it. In other words, before you can arrive at a decision with reference to the fact of possession beyond all reasonable doubt, you must find either that the defendant was in physical and actual possession of the articles mentioned in the indictment or that the evidence shows directly or indirectly that those articles belonged to him or that they were on the premises within the exclusive ultimate control of the defendant. If you have any reasonable doubt as to this situation or if you have any reasonable doubt that the premises in which these articles were found were in the exclusive ultimate control of the defendant, you must acquit him of the charges. In connection with the question of possession, mere knowledge of the whereabouts of the articles or the knowledge of their contents or recognition of their contents after they have been found is not sufficient to base a finding of possession.

Given.

/s/ J. F Mc.

INSTRUCTION No. 10

The indictment in this case is a mere accusation and is not of itself any evidence, not the slightest, of the defendant's guilt, and no juror should permit himself to be to any extent influenced because

or on account of the indictment against the defendant.

Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. He is not required to put in any evidence at all upon the subject. The burden of proof is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime.

Given.

/s/ J. F. Mc.

INSTRUCTION No. 11

The defendant has entered a plea of not guilty to the charges in this case, and such plea puts in issue the allegations contained in the indictment and requires the Government to prove such allegations to your satisfaction beyond all reasonable doubt before a verdict of guilty can be returned against the defendant.

Given.

/s/ J. F. Mc.

INSTRUCTION No. 12

You are further instructed that the defendant is presumed to be innocent of the charge filed against him until he is proven guilty beyond a reasonable

doubt by the evidence. A defendant is not required to prove himself innocent or to put in any evidence at all upon that subject. In considering the testimony in the case, you must look at such testimony and view it in the light of that presumption of innocence with which the law clothes the defendant, and you must remember that it is a presumption that abides with him throughout the case until the evidence convinces you to the contrary beyond all reasonable doubt.

Given.

/s/ J. F. Mc.

DEFENDANT'S INSTRUCTION No. 13

I instruct you, gentlemen of the jury, that in criminal cases, even when the evidence is so strong that it demonstrates the probability of the guilt of the party accused as set forth in the indictment, still if it fails to establish beyond a reasonable doubt the guilt of the defendant in the manner and form as charged, then it is the duty of the jury to acquit the defendant and bring in a verdict of not guilty.

I further instruct you that mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that upon the doctrine of chances, it is more probable that the defendant is guilty. To warrant a conviction of the defendant he must be proved to be guilty beyond all reasonable doubt

when all the evidence of the case is considered together.

Given.

/s/ J. F. Mc.

INSTRUCTION No. 14

The jury are further instructed that the presumption of innocence is not a mere form, to be cast aside by the jury at pleasure, but it is an essential, substantial part of the law of the land, and binding on the jury in this case, as in all criminal cases; and it is the duty of the jury to give the defendant in this case the full benefit of this presumption, and to acquit the defendant, unless the evidence in the case convinces you of his guilt as charged beyond all reasonable doubt.

Given.

/s/ J. F. Mc.

INSTRUCTION No. 15

Under the law, no jury should convict a person charged with crime upon mere suspicion, however strong, or simply because there is a preponderance of all of the evidence in the case against him, or simply because there are strong reasons to suspect him guilty. What the law requires before a person can be convicted of crime is not suspicion, not mere probabilities, but proof which excludes all reasonable doubt of his innocence.

Given.

/s/ J. F. Mc.

INSTRUCTION No. 16

A reasonable doubt may arise from the evidence or it may arise from the lack of evidence. It is such a doubt as would cause you, as reasonable men, to hesitate to act upon it in matters of importance to you.

It is difficult to define in exact terms the nature of a reasonable doubt. It may be said to arise from a mental operation and exists in the mind when the judgment is not fully satisfied as to the truth of a criminal charge or the occurrence of a particular event, or the existence of a thing. It is a matter that may be determined by the jury, acting under the obligations of their oaths and their sense of right and duty. If, from an examination and consideration of all the facts and circumstances in evidence taken in connection with the charge of the court, you are not satisfied beyond a reasonable doubt that the defendant is guilty as charged in the indictment, you will return a verdict of acquittal.

Given.

/s/ J. F. Mc.

INSTRUCTION No. 19

You are instructed that under the law the defendant is not compelled to testify in his own behalf. He is presumed to be innocent until he is proven guilty beyond a reasonable doubt. The burden of proving him guilty is upon the United States.

And the fact that the defendant has not testified in his own behalf shall not be considered by you in determining the question of his guilt or innocence.

Given.

/s/ J. F. Mc.

Burden of going forward with evidence doesn't mean he has to himself.

DEFENDANT'S INSTRUCTION No. 3a

I instruct you, gentlemen of the jury, that one accused of crime cannot be convicted unless the evidence excludes every reasonable hypothesis of innocence of the crime charged. And, in this case, if, from all the evidence, you should find that the defendant's guilt is not established beyond a reasonable doubt, you must find him not guilty even though you should believe that the evidence points with equal force to his guilt.

Otherwise stated, the rule of law is that if two reasonable constructions can be placed on the evidence, one of which is consistent with defendant's innocence of the crime charged or even leaves a reasonable doubt in your minds as to his guilt even though the other is equally consistent with his guilt, you still must find him not guilty.

This is a humanitarian provision of law which is not to be lightly regarded by you, and you must keep it in mind at all times and give the defendant the benefit of it.

Given.

/s/ J. F. Mc.

DEFENDANT'S INSTRUCTION No. 21

The unanimous agreement of the jury is necessary to a verdict. This is in nowise to be considered by you as a justification for abandoning your individual convictions or beliefs or doubts. While a unanimous verdict is required it must be arrived at by each juror's voting as he believes the law and the evidence justifies him to vote. While, of course, each of you must give due regard to the opinions of the others, you are not required to substitute the opinion of a fellow juror for your own simply for the purpose of arriving at a unanimous verdict.

To illustrate, if after full and fair deliberation, one or more of you believe from the law and the evidence that the guilt of the defendant is established so clearly and convincingly as to leave no reasonable doubt in your minds, you are not to vote "not guilty" merely because a majority of the jury does not believe the defendant guilty or has a reasonable doubt of his guilt. So, too, if one or more of you, after a fair and impartial discussion with your fellow jurors, are not convinced from the evidence and the law beyond a reasonable doubt that defendant has been proved to be guilty of the crime charged, you are not to vote "guilty" merely because a majority votes that way. The "unanimous" verdict of the jury must be the sum total of your individual beliefs and is not to be arrived at by an arrangement of mere compromise.

Given.

/s/ J. F. Mc.

UNITED STATES INSTRUCTION No. II

Evidence is of the least two kinds; namely, direct and positive and circumstantial evidence. Positive evidence is the testimony of a person who heard something or saw something or said something or felt something; that is to say, something that can be readily perceived by the faculties. Circumstantial evidence is proof of such facts and circumstances surrounding a crime from which a jury may infer others and connected facts which usually or reasonably follow according to the common experience of mankind.

Circumstantial evidence is regular and competent in a criminal case, and when it is of such a character as to exclude every reasonable hypothesis except that the defendant is guilty, it is entitled to the same weight as direct evidence. Circumstantial evidence in any sense would have to be considered by you in connection with other evidence produced. But, to be of value, the circumstances must be consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence and inconsistent with every other reasonable hypothesis except that of guilt.

Given.

/s/ J. F. Mc.

UNITED STATES INSTRUCTION No. VI

To support a conviction of the Defendant on the charges contained in the Indictment, you must be convinced beyond a reasonable doubt that the Defendant had possession of the narcotics described in the Indictment.

That possession must have been conscious and it may have been either actual and physical or it may have been constructive. In determining whether the Defendant had conscious possession, either physical or constructive, of the narcotics, you are instructed that possession generally means the holding or retaining of property in one's control and that one has possession of personal property when it is under his dominion and subject to his control. This means that the possessor must have had the power to exclude others having no better claim thereto from exercising dominion and control over the property. Possession once acquired may be preserved by the mere intention of the possessor, and in the absence of actual or physical possession if the possessor still intends to retain control and dominion over the property of or legal title to the subject property, he is deemed to have constructive possession of that property.

50 C.S. 781.

Given as amended.

/s/ J. F. Mc.

UNITED STATES INSTRUCTION No. VII

In the first count of the Indictment the Defendant is charged with the unlawful purchase of cocaine and heroin. The statute defining this alleged crime makes unexplained possession of heroin and/or cocaine, and the absence of appropriate tax-paid stamps therefrom prima facie evidence of their unlawful purchase. With this statutory presumption, it is not necessary that the Government introduce any evidence relating directly to the purchase if the Government has satisfied you beyond a reasonable doubt, by the evidence which it did adduce, that the Defendant had conscious possession of the heroin and cocaine described in count one of the Indictment and of that possession there has been no satisfactory explanation by the defense.

This means that if you are convinced beyond a reasonable doubt that the Defendant had in his conscious possession, on or about July 16, 1949, heroin and cocaine to which the appropriate tax-paid stamps were not affixed, you must find the Defendant guilty of the offense charged in the first count of the Indictment.

Given.

/s/ J. F. Mc.

UNITED STATES INSTRUCTION No. VIII

In the second count of the Indictment the Defendant is charged with the unlawful acquisition of marihuana. The statute defining this alleged crime

makes the possession of marihuana, coupled with a failure by the Defendant to produce certain required order forms after reasonable notice and demand, presumptive evidence of the unlawful acquisition and obtention. With this presumption, if you are convinced beyond a reasonable doubt that the Defendant had conscious possession of marihuana on or about July 16, 1949, and that he failed to produce the required order forms after reasonable notice and demand, it is not necessary that the Government introduce evidence bearing directly on how, when and where he acquired the marihuana.

This means that if you are convinced beyond a reasonable doubt that the Defendant had in his conscious possession marihuana, and that he failed to produce the required order forms after reasonable notice and demand, that you must find the Defendant guilty as to the second count of the Indictment.

Casey vs. U. S., 276, U. S. 413 (1928).

Yee Hem vs. U. S. 268, U. S. 178 (1924).

“Wigmore on Evidence,” Third Edition, Volume IV, p. 724, Section 1356.

Given.

/s/ J. F. Mc.

UNITED STATES INSTRUCTION No. IX

With respect to the quantity of heroin and cocaine alleged in count I it is not incumbent upon the government to prove the exact quantity specified therein. If you are convinced beyond a reasonable doubt by the evidence that the Defendant had in his conscious possession 915 capsules of heroin and any quantity of cocaine, less than 250 grains, that is sufficient to support a verdict of guilty as to the first count of the Indictment.

Cromer v. U. S., 142 Fed. 2d, 697 (1944).

Given as amended.

/s/ J. F. Mc.

UNITED STATES INSTRUCTION No. X

With respect to the quantity of marihuana alleged in count II it is not incumbent on Government to prove the exact quantity specified therein. If you are convinced beyond a reasonable doubt by the evidence that the Defendant unlawfully acquired or obtained a lesser quantity of marihuana cigarettes and a lesser quantity of bulk marihuana, that is sufficient to support a verdict of guilty as to the second count of the Indictment.

Cromer v. U. S., 142 Fed. 2d, 697 (1944).

Given as amended.

/s/ J. F. Mc.

UNITED STATES INSTRUCTION No. XI

You are instructed that in arriving at your verdict you may consider free and voluntary admissions if any made by the Defendant and free voluntary acts of the Defendant performed if any while he was under arrest.

Given.

/s/ J. F. Mc.

INSTRUCTION No. 1

I instruct you, Gentlemen of the Jury, that you find the defendant, Winston Churchill Henry, not guilty as to Count I.

Denied.

/s/ J. F. Mc.

INSTRUCTION No. 2

I instruct you, Gentlemen of the Jury, that you find the defendant, Winston Churchill Henry, not guilty as to Count II.

Denied.

/s/ J. F. Mc.

INSTRUCTION No. 3

If, upon a fair and impartial consideration of all the evidence on any fact or issue in this case, the jury finds that there are two reasonable theories concerning such fact or issue supported by the testimony in the case, and that one of such theories

is consistent with a theory tending to show that the defendant is guilty as charged in the indictment, and the other is consistent with a theory tending to show the innocence of the defendant, and both of said theories are equally convincing in your minds, it is your duty to resolve such fact or issue in favor of the defendant.

Denied.

/s/ J. F. Mc.

INSTRUCTION No. 6

You are instructed that even should you find that there was no tax-paid stamps on the drugs and they were in fact in the possession of the defendant at the time they were found, that does not necessarily mean that the defendant did in fact purchase those articles, since common experience does not support such a presumption. Mere possession of such articles is not a crime under our law. Therefore, unless you find from the evidence beyond all reasonable doubt that the defendant did in fact purchase the articles listed in Count I, you must acquit him as to Count I.

Denied.

/s/ J. F. Mc.

INSTRUCTION No. 8

You are instructed that mere proof that the defendant may have had such articles in his possession

is not sufficient standing by itself for you to arrive at a verdict of guilty, and unless you also find beyond all reasonable doubt that the defendant was in fact a transferee required to pay the tax, you must acquit the defendant as to Count II.

Denied as incomplete.

/s/ J. F. Mc.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Offenses:

Count I: Unlawful purchase of a derivative of opium, to wit, 946 capsules, each containing heroin and a derivative of coca leaves, to wit, 250 grains of cocaine, which heroin and cocaine was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), Title 26, U.S.C.

Count II: Being a transferee required to pay the transfer tax imposed by Section 2590(a), Title 26, U.S.C., did unlawfully acquire and otherwise obtain a quantity of marihuana, to wit, 787 grains of bulk marihuana and 35 marihuana cigarettes, without having paid such tax, in violation of Section 2593, Title 26, U.S.C.

Concise statement of judgment or order, giving date and any sentence:

On January 26, 1950, after a trial by jury on a plea of not guilty by the defendant, a judgment

was entered pursuant to a verdict of guilty found by the jury in the above-entitled case on January 12, 1950. The defendant was found guilty of the offenses as charged, judgment being entered accordingly, and the defendant above named was sentenced, as to Count I, to be confined in prison for a term of four (4) years and to pay a fine of \$1,000.00, and as to Count II to be confined in prison for a term of two (2) years and to pay a fine of \$1,000.00, both sentences to run consecutively. Bail for the defendant, having been previously set in the amount of \$2,500.00, was ordered continued for ten (10) days from the judgment of the above-entitled Court pending possible appeal.

I, Winston Churchill Henry, the above defendant and appellant, by my attorneys, Landau & Fairbanks and O. P. Soares, hereby give notice of appeal and do hereby appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit from the above-stated judgment.

Dated: Honolulu, T. H., this 2nd day of February, 1950.

WINSTON CHURCHILL
HENRY,
Defendant.

By LANDAU & FAIRBANKS and
O. P. SOARES,
His Attorneys.

By /s/ SAMUEL LANDAU.

[Endorsed]: Filed Feb. 3, 1950.

[Title of District Court and Cause.]

ELECTION OF DEFENDANT

Judgment in the above-entitled action having been rendered on January 26, 1950, the defendant having been sentenced to serve in prison for a term of six (6) years, and an appeal having been noted in the above-entitled action on February 3rd, 1950, the defendant hereby declares that he does elect not to commence service of the sentence.

Dated: Honolulu, T. H., this 2 day of February, 1950.

/s/ WINSTON CHURCHILL
HENRY,
Defendant.

By LANDAU & FAIRBANKS and
O. P. SOARES,
His Attorneys.

By /s/ SAMUEL LANDAU.

[Endorsed]: Filed Feb. 6, 1950.

[Title of District Court and Cause.]

COST BOND

Winston Churchill Henry, appellant herein, and Leonard K. M. Fong, surety, appearing and submitting to the jurisdiction of the Court, hereby undertake for themselves and each of them, their and each of their heirs, executors and administrators, successors and assigns, to make good all taxable costs and charges not exceeding the sum of Two Hundred Fifty Dollars (\$250.00) that the appellees may be put to or allowed if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified.

The said surety hereby irrevocably appoints the Clerk of this Court as his agent upon whom any papers affecting his liability on this undertaking may be served.

Signed, sealed and delivered this 3rd day of February, 1950.

/s/ WINSTON CHURCHILL
HENRY.

/s/ LEONARD K. M. FONG.

Approved:

/s/ RAY J. O'BRIEN,
United States Attorney.

Territory of Hawaii,
City and County of Honolulu—ss.

Leonard K. M. Fong, being first duly sworn, on oath deposes and says that he is the Leonard K. M. Fong named as a surety and who filed the foregoing Bond and that he is worth the sum of Two Hundred Fifty Dollars (\$250.00) over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ LEONARD K. M. FONG.

Subscribed and sworn to before me this 6th day of Feb., 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of
Hawaii.

[Endorsed]: Filed Feb. 6, 1950.

[Title of District Court and Cause.]

BOND

Know All Men By These Presents:

That we, Winston Churchill Henry, as principal, and Fong Hing and Leonard K. M. Fong, as sureties, are held and firmly bound unto the United States of America in the full sum of \$4,500.00 for the payment of which well and truly to be made we do bind ourselves, our executors and administrators, jointly and severally by these presents,

Whereas, lately in the United States District

Court in and for the District and Territory of Hawaii judgment and sentence were made and entered against Winston Churchill Henry, defendant above named, and

Whereas, notice has been given of appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit to secure a reversal of said judgment and sentence, and

Whereas, the Honorable J. Frank McLaughlin, Judge of said District Court, did regularly order that a supersedeas and bail bond be given in the sum of \$4,500.00 pending said appeal.

Now, Therefore, the condition of the above obligation is such that if the said Winston Churchill Henry shall appear here in person or by attorney in the United States Circuit Court of Appeals for the Ninth Judicial Circuit on such day or days as may be appointed for the hearing of said cause in said Circuit Court and prosecute his appeal and shall abide by and obey all orders made by said Circuit Court in said cause, and shall pay any fine, damages and all costs imposed by the judgment of said District Court against him, and shall surrender himself in execution of the judgment and sentence appealed from as said Circuit Court may direct, if the judgment and sentence against him shall be affirmed or the appeal dismissed; and if he shall appear for trial in said District Court on such day or days as may be appointed for a retrial of said cause and abide by and obey all the orders made by said District Court, provided the judgment and sentence made against him shall be reversed by said

Circuit Court, and if he shall not leave the territorial jurisdiction of the City and County of Honolulu, Territory of Hawaii, without first obtaining the permission of the Court, then the above obligation shall be void, otherwise to remain in full force, effect and virtue.

In Witness Whereof, the above bounden principal and sureties have hereunto affixed their hands this 14th day of February, 1950.

/s/ WINSTON CHURCHILL
HENRY,
Principal.

/s/ FONG HING,
Surety.

/s/ LEONARD K. M. FONG,
Surety.

Taken and acknowledged before me this 14th day of February, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States
District Court.

Territory of Hawaii,
City and County of Honolulu—ss.

Fong Hing, being first duly sworn, on oath deposes and says that he is the Fong Hing named as a surety and who filed the foregoing Bond and that he is worth the sum of \$9,000.00 over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ FONG HING.

Subscribed and sworn to before me this 14th day of February, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, Territory of
Hawaii.

Territory of Hawaii,
City and County of Honolulu—ss.

Leonard K. M. Fong, being first duly sworn, on oath deposes and says that he is the Leonard K. M. Fong named as a surety and who filed the foregoing Bond and that he is worth the sum of \$9,000.00 over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ LEONARD K. M. FONG.

Subscribed and sworn to before me this 14th day of February, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, Territory of
Hawaii.

Approved as to Form:

/s/ RAY J. O'BRIEN,
United States Attorney.

Approved as to the amount and sufficiency of surety.

/s/ J. FRANK McLAUGHLIN,
Judge, U. S. District Court.

[Endorsed]: Filed Feb. 14, 1950.

[Title of District Court and Cause.]

AMENDED DESIGNATION OF RECORD
ON APPEAL

In making up the transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, you will please include the following:

1. Indictment filed September 15, 1949.
2. Motion for Bill of Particulars filed September 27, 1949, together with Affidavit thereon.
3. Motion to Transfer Case from the District of Hawaii and Affidavit filed October 26, 1949.
4. Clerk's Minutes of September 28; October 5, 7; November 1, 9, 10, 1949; January 4, 5, 6, 9, 10, 11 and 12, 1950.
5. Defendant's Requested Instructions 1, 2, 3, 6 and 8 which were refused by the Court and Government's Instructions 9 and 10 given by the Court over objection of Defendant.
6. Official Reporter's Transcript of Evidence taken and proceedings had during the argument on the Motion for Bill of Particulars and the Motion to Transfer Case from the District of Hawaii and during the trial, including all statements made by the Court to the jury during the deliberation of the jury.
7. Exhibits introduced by Defendant during hearing on Motion to Transfer Case from the District of Hawaii.

8. Motion for New Trial filed January 23, 1950.
9. Clerk's Minutes of January 26, 1950.
10. Official Reporter's Transcript of Testimony taken on January 26, 1950, during argument on the Motion for New Trial and the actual Sentence of the Court and exception thereto.
11. Judgment of Sentence of the Court.
12. Notice of Appeal filed February 3, 1950.
13. Election of Defendant filed February 3, 1950.
14. Bond filed February 3, 1950.
15. Cost Bond filed February 3, 1950.
16. This Amended Designation of Record on Appeal filed April 14, 1950.

Dated: Honolulu, T. H., April 14, 1950.

WINSTON CHURCHILL
HENRY,
Defendant.

By LANDAU & FAIRBANKS and
O. P. SOARES,
His Attorneys.

By /s/ SAMUEL LANDAU.

[Endorsed]: Filed April 14, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

In making up the transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, please include the following:

1. All instructions given by the Court.
2. This Designation of Record on Appeal filed April 25, 1950.

Dated: Honolulu, T. H., this 24th day of April, 1950.

RAY J. O'BRIEN,
United States Attorney,
District of Hawaii.

By /s/ HOWARD K. HODDICK,
Asst. United States Attorney,
District of Hawaii.

[Endorsed]: Filed April 25, 1950.

[Title of District Court and Cause.]

AMENDED DESIGNATION OF RECORD ON APPEAL

In making up the transcript of the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled Cause, please include in addition to the items speci-

filed in the Designation of Record on Appeal filed by the Plaintiff on April 25, 1950, the following:

1. Affidavit and search warrant.
2. This Amended Designation of Record on Appeal.

Dated: Honolulu, T. H., this 25th day of April, 1950.

RAY J. O'BRIEN,
United States Attorney,
District of Hawaii.

By /s/ HOWARD K. HODDICK,
Asst. United States Attorney,
District of Hawaii.

Service admitted.

[Endorsed]: Filed April 25, 1950.

AFFIDAVIT FOR SEARCH WARRANT

(Internal Revenue Form)

United States of America,
District of Hawaii—ss:

On this 12th day of July, A.D. 1949, before me, Harry Steiner, a United States Commissioner in and for the District of Hawaii, personally appeared Gerry Wilson, who being duly sworn, deposes and says:

That she has good reason to believe and does believe that in and upon certain premises within the

District of Hawaii, to wit, the premises known as: and particularly described as follows: in a two story stucco building located at 803 Haus-ten Street, Honolulu, T. H., said two story stucco building is painted white with green awning and is the second building in the rear of 803 Haus-ten Street, Honolulu, T. H., there have been and are now located and concealed and sold certain property used as the means of committing a fraud upon the revenue of the United States, to wit:

Heroin in violation of Internal Revenue Code, Sections 2553(a) and 2593(a).

That the facts tending to establish the grounds of this application and the probable cause of affiants believing that such facts exist, are as follows:

That the Affiant, Gerry Wilson, on July 7, 1949, visited the above-described premises and purchased one (1) capsule of Heroin from a negro man known to her as Winston Churchill Henry, alias Frisco Shorty, who lives on said premises. The Affiant, Gerry Wilson, further states that she had purchased Heroin on very many occasions from May to July, 1949, inclusive, from Winston Churchill Henry in said premises. From the Affiant's observation, she finds that these premises are a place where Heroin is kept for sale and replenished as needed. Affiant has seen said Winston Churchill Henry replenish his supply of Heroin from said premises as needed when said Winston Churchill Henry does not have Heroin on his person and said Affiant has also on very numerous occasions seen Winston Churchill

Henry produce Heroin for sale from his own person.

Wherefore, your affiant prays that a Search Warrant may issue authorizing a search of the aforesaid premises in the manner provided by law.

/s/ GERRY WILSON.

Sworn to and subscribed before me, this 12th day of July, 1949.

[Seal] /s/ H. STEINER,
United States Commissioner,
District of Hawaii.

[Title of District Court and Cause.]

SEARCH WARRANT

To William K. Wells, Acting District Supervisor,
Bureau of Narcotics:

Affidavit having been made before me by Gerry Wilson that she is positive that on the premises known as In a two story stucco building located at 803 Husten Street, Honolulu, T. H., said two story stucco building is painted white with green awning and is the second building in the rear of 803 Husten Street, Honolulu, T. H., in Honolulu, District of Hawaii, there is now being concealed and sold certain property, namely Heroin, in violation of Internal Revenue Code, Sections 2553(a) and 2593(a).

That the Affiant, Gerry Wilson, on July 7, 1949, visited the above-described premises and purchased one (1) capsule of Heroin from a negro man known to her as Winston Churchill Henry, alias Frisco Shorty, who lives on said premises. The Affiant, Gerry Wilson, further states that she had purchased Heroin on very many occasions from May to July, 1949, inclusive, from Winston Churchill Henry in said premises. From the Affiant's observation, she finds that these premises are a place where Heroin is kept for sale and replenished as needed. Affiant has seen said Winston Churchill Henry replenish his supply of Heroin from said premises as needed when said Winston Churchill Henry does not have Heroin on his person and said Affiant has also on very numerous occasions seen Winston Churchill Henry produce Heroin for sale from his own person, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (person) (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search (at any time in the day or night) and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this

warrant and bring the property before me within ten days of this date, as required by law.

Dated this 12th day of July, 1949.

[Seal] /s/ HARRY STEINER,
 U. S. Commissioner.

RETURN

I received the attached search warrant July 12, 1949, and have executed it as follows:

On July 16, 1949, at 12:40 o'clock p.m., I searched ~~(the person)~~ (the premises) described in the warrant and

I left a copy of the warrant with Winston Churchill Henry together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1—Air mail envelope containing 29 capsules suspected to be heroin.

1—paper bindle containing 2 capsules suspected to be heroin.

1—Ovaltine bottle containing 915 capsules suspected to be heroin.

1—Bottle containing approx. 200 grs. of cocaine.

1—Paper bag containing approx. 2 ounces marihuana in bulk.

1—New Drene shampoo box containing 29 suspected marihuana cigarettes.

6—Suspected marihuana cigarettes.

129 Empty gelatin capsules No. 5 in a box.

275 Empty gelatin capsules No. 5 in a manila paper.

This inventory was made in the presence of Winston Churchill Henry and

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ WILLIAM K. WELLS.

Subscribed and sworn to and returned before me this 18 day of July, 1949.

[Seal] /s/ HARRY STEINER,
United States Commissioner.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following listed original pleadings, transcripts of proceedings, exhibits, and instructions:

Indictment.

Motion for Bill of Particulars and Affidavit.

Motion to Transfer Case from the District of Hawaii, Notice and Affidavit.

Motion for a New Trial.

Judgment and Commitment.

Notice of Appeal.

Election of Defendant.

Cost Bond.

Bond (supersedeas).

Stipulation Extending Time to File Transcript of Record and Order.

Amended Designation of Record on Appeal (Appellant).

Designation of Record on Appeal (Appellee).

Amended Designation of Record on Appeal (Appellee).

Transcript of Proceedings—September 28 and October 7, 1949.

Transcript of Proceedings—November 1, 9 and 10, 1949.

Transcript of Proceedings—January 4, 5, 6, 9, 10, 11, 12 and 26, 1950.

Defendant's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 9, admitted in hearing on motion to transfer case from the District of Hawaii.

Instructions Given.

Instructions Denied—Defendant's Nos. 1, 2, 3, 6 and 8.

Affidavit and Search Warrant.

I further certify that included in said record on appeal is a copy of the court minutes of September 28, October 5, 7, November 1, 9 and 10, 1949; January 4, 5, 6, 9, 10, 11, 12 and 26, 1950.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of April, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,

Clerk, U. S. District Court,
District of Hawaii.

In the United States District Court for the
Territory of Hawaii

Criminal Nos. 10,253—10,254—10,256

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WINSTON CHURCHILL HENRY,

Defendant.

Before: Hon. Delbert E. Metzger,
Judge.

Appearances:

HOWARD K. HODDICK, ESQ.,
Assistant U. S. Attorney,
Appearing for Plaintiff;

SAMUEL LANDAU, ESQ.,
Appearing for Defendant;

KATSURO MIHO, ESQ.,
Appearing for Defendant in Criminal No.
10,256.

PROCEEDINGS

The Clerk: Criminal No. 10,253, United States of America versus Winston Churchill Henry; case called for hearing on motion for bill of particulars.

Mr. Landau: If the Court pleases, the motion for a bill of particulars is as to both counts of the indictment. The first count of the indictment is

that the defendant on or about the 16th of July did knowingly, wilfully, unlawfully and feloniously purchase a salt, compound and derivative of opium, which was not in a stamped package and was not from the original stamped package. I am asking, if the Court pleases, in this motion for a bill of particulars as to this count the time, place and circumstances of the alleged purchase and the person from whom the defendant is alleged to have purchased the articles mentioned in Count 1. I believe that this particular problem was probably touched upon in a motion for a bill of particulars which was filed in another case in this Court last year, or the early part of this year.

In support of that motion, if the Court pleases, I'd like to call the Court's attention to a Fourth Circuit Court of Appeals case, Ong against United States, at 131 Federal 2nd, 175, where the court went into the question as to whether or not the indictment was in good form. And the court there held,

"The violation was described in general terms . . ." This is a motion to quash.

The Court: When was the date of that?

Mr. Landau: November 6, 1942.

The Court: Yes. Go ahead.

Mr. Landau: The defendant had moved the court to throw out the indictment on the ground of it being vague and indefinite. The court said,

"The violation was described in general terms, it is true . . ."

Mr. Hoddick: Excuse me one minute. The motion was to vacate judgment after conviction.

Mr. Landau: Yes. "The counts of the indictment under which the consecutive terms of imprisonment were imposed were so vague as to be invalid and that, in any event, they charged but one crime."

In other words, they were attacking the indictment, even though it was after the judgment.

"The violation was described in general terms, it is true, without naming the purchaser or person to whom the drugs were delivered, which would have been the better practice; but, if the accused desired more specific information as to the charge against him, his remedy was to ask for a bill of particulars."

And that's what we are doing. In other words, the court [2*] intimates in that case that if the name of the purchaser is not given, and if we need further information to properly defend this case, we come in by a motion for a bill of particulars; the inference being that had the defendant in that case filed a motion that information would have been given to him.

Now, as to the second count, if the Court pleases, which is with reference to marihuana, he is charged with being a transferee, required to pay the tax, "did knowingly, wilfully, unlawfully and feloniously acquire and otherwise obtain a quantity of marihuana . . . without having paid such tax."

Now, they have made a conclusion of law that

* Page numbering appearing at top of page of original Reporter's Transcript.

the defendant was a transferee. We would like to know, if the Court pleases, in what manner the defendant became a transferee. In other words, we have to file a bill of particulars rather than a motion to quash because, since it is within the terms of the statute, we cannot say that the indictment is bad. But we can and do say that, although it is in the words of the statute, it is not sufficient, doesn't give us sufficient information. And under ordinary rules where there are conclusions of law stated in the indictment without any facts to bear them out, in our district court, the Territorial court, that is attackable by a demurrer. No demurrer is available in the Federal Court; and under the rules—and cases have been cited—since the rules of criminal [3] procedure have been changed, our only recourse to attack that is by a bill of particulars.

So we want to know what facts do they rely upon, what do they state, upon which they conclude that the defendant was a transferee required to pay the tax. We also want to know the time, the place, and the circumstances under which he did become a transferee. I imagine, though, those two could be linked up into one, and an answer to either one would probably be an answer to the other.

It also says, if the Court pleases, that he unlawfully acquired and otherwise obtained. We'd like to know when he acquired this. We may find that from their answer—and I cannot tell at the moment—that the time of acquisition may have been

the same time that they allege and the same manner that they allege that he became a transferee. They also say that he acquired and otherwise obtained, which makes it a little vague and confusing to us. There is no judicial decision that I can find as to what "acquired and otherwise obtained" is. My understanding of acquisition is one thing but "otherwise obtained" makes it very broad and very vague. We want to know what the Government relies upon. What is it that they say that he acquired, and if so, how did he acquire it? Did he obtain them otherwise? What does "otherwise obtain" them mean?

Mr. Hoddick: May it please the Court, I would like to [4] point out that Section 2553, which defines the offense with which the defendants are charged, the defendant is charged, Count 1 of the indictment, makes it unlawful for any person to purchase, sell, dispense or distribute any narcotics except in the original stamped package or from the original stamped package. Now, in the first case and the only case which Mr. Landau has cited, *Ong versus the United States*, the defendant was charged with having purchased, sold and dispensed; and it is perfectly proper as it was when Mr. Landau filed a similar motion for a bill of particulars in an earlier case, to want to know whether the defendant is being, whether the defendant is going to be shown to have purchased or to have sold the narcotic drugs. And in this case we have simply charged the defendant with the purchase. The same

statute makes the possession of the narcotics drugs, when they are not in the original stamped package or from the original stamped package, prima facie evidence of a violation of this subsection. In other words, the defendant in this case is found in the possession of the drugs, and that is prima facie evidence that there was an unlawful purchase. That's all we are charging the defendant with. How he obtained them, from whom he obtained them, is a matter which is peculiarly within his own knowledge. And an old case but a rule which I think has been followed throughout the rules as to motions for bills of particulars [5] in civil matters, and which is applicable to criminal matters, is in *United States versus Tilden*, Federal Case No. 16,521, where the court held that where the information asked for in the motion for a bill of particulars was information which would be peculiarly within the knowledge of the defendant and which the plaintiff could not be expected to know or to have, the motion for a bill of particulars should not be granted.

And that is the defense that I would like to make to the motion in this case. How the defendant came in possession of these drugs, I don't know. I am going to have to rely on the presumption in the statute and require the defendant to give a reasonable explanation therefor. That is as to Count 1. As to Count 2, I make the same defense, that is, the motion for a bill of particulars as to Count 2—and I would point out to the Court that there is also a presumption under Section 2593 which defines the violation. There it says,

“... and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by Section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by Section 2590(a).” [6]

Once again you have the question of presumption arising from possession. Certainly nobody is better informed as to how he came into possession of these drugs than the defendant himself. That's all.

Mr. Landau: If the Court pleases, I think Counsel is guilty of a confusion in his mind, and given the benefit of the doubt in that when he says that the defendant knows how he got possession of them—this is a criminal case, if the Court pleases, and this is not a civil case. The presumption of innocence isn't anything that we just talk about and then forget. It is something which is a firm and important matter that remains with the defendant not only in the trial of the merits but in any stage of the case. For Counsel to say that we don't have to give them the information because the defendant knows how he got it places the Government in a position to say, well, the man is guilty so he knows how he got that stuff. The man is innocent, if the Court pleases, until the Court in the jurisdiction finds him guilty. And I submit, if the Court pleases, with that presumption of innocence to refuse to give him the information would

be erroneous on the part of the government. The man says, I don't know anything about it. When he enters a plea of not guilty in this case, it puts in issue every material allegation of the indictment, and that includes the fact that there was narcotics or that he ever had possession of the narcotics; [7] and if he, on his plea of not guilty, denies that he ever had narcotics, how can the Government say, well, he had the narcotics and we don't have to give him the information as to how he got it. They are charging him with the possession, if the Court pleases, and if they are charging him with the possession, with the presumption of innocence it is their duty to tell Counsel and the Defendant and the Court at this time, so that a proper defense can be prepared and a proper pleading entered in this Court, just what it is they rely upon.

Now, in the case which I mentioned some time ago, which Counsel agreed with me, the charge in that case was that he did purchase, sell, dispense and distribute. And in the motion for a bill of particulars the court agreed with me that whatever effect the presumption under the statute might be as to the bill of particulars on the indictment, they had to allege which of those four things they were relying upon, and having determined which of those four things they were relying upon the other necessary information was to come along. And they did change it to "purchase" and they did give us the information from whom I believe the defendant is supposed, or was supposed to have purchased those narcotics.

Now, Counsel, as I say, in his argument indicated to the Court that he is relying purely upon that civil rule, on the theory that the defendant, that the information is in the [8] possession of the defendant. To assume that, if the Court pleases, at this time is to tell the defendant right now that he is guilty. There is no sense going to trial. And we know very well that in this court those rules don't apply. The presumptions, if the Court pleases, which Counsel mentions are presumptions which may arise during the course of a trial but don't alter the fact that we need information and that information is available to us by a bill of particulars.

Mr. Hoddick: May I respond to Counsel?

The Court: What?

Mr. Hoddick: May I respond to Counsel's argument?

The Court: Well, I suppose then he'd want to respond to yours, and so on. The only allegation in the indictment is that on or about the 16th day of July he feloniously purchased the stuff. Now, the time is fixed there in the indictment. As to whom he purchased it from, from whom he purchased the salt, there is no allegation, and I am not convinced that there is any duty on the Government to name the person from whom the indictment was made. It may not be within the knowledge of the Government, the name of the person. But I do think that the defendant is entitled to more particulars than are given here. They ask for the place where he

purchased it. Now, if the indictment stands, the statement rather, the allegation that he did purchase, it certainly is going to be incumbent upon the Government to [9] show not only when but where he purchased it.

Mr. Hoddick: May it please the Court, if I can interrupt your comment for a moment—

The Court: Yes, go ahead.

Mr. Hoddick: —the statute provides that if the Government shows that this man had possession of the drugs, that is sufficient.

The Court: Possession isn't charged here. The charge here is that he purchased.

Mr. Hoddick: Excuse me, your Honor, possession is not the crime. Possession is merely *prima facie* evidence.

The Court: I held that before.

Mr. Hoddick: And if the Government comes in on the trial and is able to show that the defendant had possession of the drugs, that is *prima facie* evidence whether the jury considers it sufficient evidence or not, and it is up to the jury, but whether they consider that the defendant, if he takes the stand and gives a reasonable explanation of how he acquired possession, that is up to the jury; but in this case the place is unknown to the Government as is the person from whom he purchased the drugs. That is why that *prima facie* evidence clause is put there, was put in the statute, and it has been held Constitutional by the courts.

The Court: Well, that could put every person

on trial, every person at home in whose medicine cabinet there are [10] drugs, or any other place.

Mr. Hoddick: That may be, your Honor, but Congress——

The Court: Put them on trial as being a purchaser.

Mr. Hoddick: It is possible to make a lawful purchase of these drugs, and there are order forms provided for.

The Court: It is possible to make a lawful purchase without knowing anything about whether it comes from the original package or where it comes from.

Mr. Hoddick: That might all be brought out on trial, but that is all knowledge that the defendant has.

The Court: Well, somebody put the burden on the defendant——

Mr. Hoddick: No, I don't believe so, your Honor. The Government must carry the burden of proving that the defendant had possession of these drugs. At that stage Congress has said that this is a matter which only the defendant can know about, how he acquired it. We are provided certain means by which we can obtain these drugs, and he knows whether he followed the process which we have laid out. And he is going to have to explain whether he did or did not. The burden is still on the Government. This is not a presumption that the defendant is guilty. It is merely *prima facie* evidence of that guilt. We can't tell whether it is sufficient evidence.

The Court: How does the ordinary citizen who may have [11] this particular drug, or any other narcotic drug, how does the ordinary citizen who has possession of such a drug come into possession? Most often either through a physician or nurse's administration or through a prescription, or he goes to a drug store, sends someone there to make the purchase for him. And that's all he knows about the derivation of the drug, whether it comes out of a registered tax-paid package or where it comes from.

Mr. Hoddick: There is a procedure set out where any transferee of these derivatives of opium and cocaine goes to the Collector of Internal Revenue and he gets a form; if he is a physician or a pharmacist, he pays a very small tax for that order form, and then he is able to purchase the goods. They divide it into a number of different categories. I suppose if he is a wholesaler he pays a lesser tax or a higher tax. And an individual who is getting it under a doctor's prescription for some disease which he may have pays a specified tax. But any other person who is found in the possession of these drugs is presumed to have purchased them unlawfully unless he can produce that order form and the tax stamp thereon. And that, I think, is quite proper. Otherwise we would have no control in this country over the illegal sale and purchase of narcotics. It is too bad that they had to put it in the Internal Revenue Code instead of making it a direct crime, a direct criminal viola-

tion. [12] Apparently that was the way it had to be done. But if your Honor demands that the Government show in this case the place where the defendant got these drugs, and, as I pointed out, he is the only one who knows, then I will have to confess that we will have to ask to nolle prosequi the indictment because we don't have that information. It is certainly no hardship on the defendant to produce those forms or to show that the drugs were given to him by a doctor. And again I point out that this does not overcome the presumption that the defendant is innocent. It doesn't go contrary to that presumption. This is merely, the possession is merely *prima facie* evidence.

Mr. Landau: Well, Counsel wants to wipe out the presumptive innocence.

Mr. Hoddick: I do not.

Mr. Landau: He says the defendant knows where he got it.

Mr. Hoddick: Doesn't he?

Mr. Landau: No, he denies that he had possession of it.

Mr. Hoddick: That will go to the trial of the merits.

Mr. Landau: But you say he has the information, and that doesn't go into——

Mr. Hoddick: We have to prove in the trial that he had possession. If you can prove that he did not, the case collapses. [13]

Mr. Landau: I don't think Counsel is correct in his statement.

Mr. Hoddick: I also would point out that——

Mr. Landau: Just a second. I wish Counsel would address the Court. I submit, if the Court pleases, that the Court's original ruling is absolutely correct in this matter; that any other ruling would indicate that the defendant had possession, and therefore he knows where he got it, and it obviates completely the effect of his plea of not guilty and the presumption that arises and remains with him throughout all the stages of these proceedings.

Mr. Hoddick: I would point out, your Honor, that the rule that I cited at the opening of my argument, that if the defendant has knowledge concerning a subject it is not proper to grant a motion for a bill of particulars. It is not one limited to civil cases. I was quoting from a criminal case decided in the Southern District of New York in connection with income tax violations.

Mr. Landau: How can the Government say that the defendant is peculiarly within that knowledge when he denies that he had possession?

Mr. Hoddick: Then we go to trial on the question of whether he had possession.

Mr. Landau: Then we go to trial without getting the information. [14]

Mr. Hoddick: You have the information right here that he had possession or that he did not. You know that. We charge that he did.

Mr. Landau: We deny that he had possession. We want to know on what you rely.

Mr. Hoddick: I would point out to the Court

that the particulars asked for by the Defendant, it is not in our capacity to furnish. In one case it was decided before this where a motion for a bill of particulars was denied because it was held that that matter was peculiarly within the knowledge of the defendant, and the court instructed the prosecutor that if he should obtain such knowledge before the case came to trial then he should immediately advise the court and the defendant. And I think that is a proper ruling.

The Court: What case was that?

Mr. Hoddick: Your Honor, I haven't made a full note of that. I will have to check over the cases that I read.

The Court: Well, how long ago was it?

Mr. Hoddick: It was in one of the Federal 2nd decisions.

The Court: Oh, I thought you said it was in this Court.

Mr. Hoddick: Oh, no, your Honor, no. That seems to me to be a very reasonable approach to this problem.

Mr. Landau: Counsel first says we will give them the information if we ever have it, and before he says we don't have the information and have no way of ever getting it. [15]

Mr. Hoddick: That is true.

Mr. Landau: That is a peculiar theory upon which to handle this motion, if the Court pleases. In effect what will happen is that the information will not become available to the defendant at any time.

Mr. Hoddick: And we will probably have to go to trial relying on the possession as *prima facie* evidence of the violation. And then I think that it is up to the Court or the jury to determine whether that is sufficient evidence. But I think it is improper to require the Government to come forward now with the information which it obviously does not have, and with information which the defendant obviously does——

Mr. Landau: As the Court well knows, the presumption doesn't make the man guilty. It is one form of proof. It doesn't obviate the necessity of having the information that is in the indictment. The presumption may assist them in proving the allegations of the indictment as properly charged, but it doesn't obviate them from giving that information.

The Court: Well, now, this statute has been on the books for a long time, this statute making it *prima facie* evidence to have possession, *prima facie* evidence of guilt. Well, just what it is, I don't know; it might be purchase; it might be of dispensation, sale. It isn't a fact that the law says merely having possession constitutes a crime. It says *prima facie* evidence of the commission of several of them, several [16] other things that are made unlawful. I would suppose that there would be numerous cases where that matter of *prima facie* evidence attack where it was used as the basis for an indictment. And I am rather surprised that you gentlemen haven't devoted more cases to the attention of the

Court than this one cited in 131 Federal back in '42, seven years ago, and the cases mentioned by Counsel for the Government. I would like to be better informed as to what the reasoning of other courts has been in regard to that.

Mr. Hoddick: May it please the Court, there have been four cases that are cited under Section 2553 with reference to a motion for a bill of particulars, and in each of those cases the court discusses the principle that a motion for a bill of particulars is addressed to the discretion of the court. Unfortunately, in those cases the indictment charged the sale of narcotics as well as the purchase. And in connection with the sale I can well see where the defendant could come in and require the Government to show to whom the sale was made. In this case we have only asked for the purchase. In those cases it has been held that it is not an abuse of discretion for the court to deny the motion for a bill of particulars. It has been held that later they filed a motion to vacate the judgment because the counts were too vague and general; that the proper remedy for the defendant if he felt that they were too vague and general was to have [17] filed a motion for a bill of particulars.

The Court: Well, if you admit that where a sale is alleged, that it is necessary for the Government to show in the indictment or by supplementary information to whom the sale was made, it seems to me to be the same reasoning is equally essential that in the allegation of purchase that you should show from whom the purchase was made.

Mr. Hoddick: No, your Honor, because in the case of a sale the possession of the narcotic will be in the hands of the person to whom they are sold.

The Court: Not necessarily. He may have used them.

Mr. Hoddick: But anyway the only way you find out by the sale is from the purchaser, so you have his name. But when you charge a purchase, the only way you have evidence of the purchase is the possession by the defendant.

The Court: The view is that that puts a burden upon the possessor.

Mr. Hoddick: That is correct, and I think that is a proper burden, your Honor, where you have contraband articles. These are narcotics. These are things that people deal with in the back streets as well as use them for medicinal purposes.

The Court: Well, I'd like to have more legal light on the thing than I have gotten this morning. I will continue the matter for further consideration by myself, and I should [18] like to have more authorities presented to me.

Mr. Hoddick: Your Honor, I think that the reason there is so little authority in the books is—well, the simple hypothesis that the defendant is the only one who will know how he came into possession. What you are going to try in the case is whether he had possession or not, and if you prove that he had it, or make a substantial showing that he had it, then the defendant is going to show that he acquired it in a lawful manner.

Mr. Landau: Well, my theory, if the Court pleases, is quite the contrary. The reason there is so little authority on the books is that motions for bills of particulars have been granted. Therefore, there have been no occasions to go up to the appeal courts for denial of the motion.

Mr. Hoddick: If the motion is granted in this case, your Honor, you literally preclude the Government from presenting to the Court the *prima facie* evidence which is provided for in the statute.

The Court: But, on the other hand, if you indict a man purely on the statement that this and that is *prima facie* evidence of guilt, infraction of some law, why, where would become the presumption of innocence?

Mr. Hoddick: Congress has felt that in connection with narcotics it is essential to modify that presumption of innocence. [19]

Mr. Landau: Congress couldn't modify the presumption of innocence. It is what the courts in protecting the defendant say that is material.

Mr. Hoddick: I would be glad to submit a memorandum to the Court, if the Court desires, on the subject.

The Court: I'd like to have further light on the thing from whatever sources I can get it. I think I shall continue this matter. How long do you think that Lantis case will take in the trial?

Mr. Hoddick: I think one day, your Honor.

The Court: You think that will be enough? Could you gentlemen be ready by next Monday?

Mr. Landau: What day is that?

The Court: October 3rd.

Mr. Landau: Well, your Honor, I will not be in the office on the 3rd.

The Court: How about Wednesday, October 5th?

Mr. Hoddick: That is agreeable to the Government, your Honor.

Mr. Miho: I have a trial in the Circuit Court. I think it covers the entire week of October 3rd, and another trial on the 10th. But about the 12th or 13th.

The Court: Are you in this case, too?

Mr. Miho: I have the same motion. It is a different defendant but the same principles are involved and the same [20] motion.

Mr. Hoddick: May it please the Court, if you only desire the submission of a written memorandum or——

The Court: Yes, I'd like to have a written memorandum.

Mr. Hoddick: Then it seems to me that it doesn't matter whether Counsel are going to be occupied in court or not.

The Court: Do you suppose that you can furnish that by Monday, Mr. Landau?

Mr. Landau: Well, as I indicated to the Court, I will not come in at all into the office on Monday.

The Court: Well, I know, but could you submit it to the Court and then appear Wednesday morning? I think one of you will be enough to argue this proposition just the same——

Mr. Landau: Well, may I be permitted instead of Monday to try to get it in on Tuesday and give your Honor one day less?

The Court: Well, I have a jury trial on Tuesday and another one on Thursday.

Mr. Miho: Would it be at all possible to submit the memorandum by the 5th and then have an argument on the matter on the 12th when Counsel can be heard?

The Court: Well, the probabilities are that the calendars will shift. Monday is the 3rd. And on the 10th of October, the second Monday, the probabilities are that the calendars will shift. [21]

Mr. Miho: We can submit the memorandum by Tuesday, I should think, on both sides.

The Court: Well, what I had in mind was that if we can get your memoranda before the Court and give the Court a couple of days to look at your authorities and list them, and perhaps make some research, and so on, and then you might come in on Wednesday, the 5th, and if you have anything new to present——

Mr. Landau: I will try to get it in by the 3rd. I won't be in. I will have somebody else sign it for me. Perhaps Counsel will sign it.

The Court: I don't care where it comes from.

Mr. Miho: I will try to be here. I believe I can.

Mr. Hoddick: May it please the Court, since Mr. Landau and Mr. Miho are the movants in this case, I think it is only proper that they submit their memoranda in support of the bill of par-

ticulars, and then we be given an opportunity to reply to that.

The Court: Well, that was the idea, and having a couple of days between the time when the memorandum is submitted and the time when it is entertained by the Court. If they could get it in Monday, furnish you with a copy, Wednesday ought to be a proper time for hearing from you and for the Court to give consideration to whatever authorities and reasoning they had and to hear any further reasoning on [22] Wednesday for a brief time.

Mr. Hoddick: That is agreeable.

The Court: Then to continue the case until Wednesday, October 5th, with that understanding, that whatever authority you have or whatever reasoning in addition to what is thus far presented, put it down in writing and get it to the Court and get it to Counsel. And at the same time, if you have any additional matters to that you have expressed, you get that to the Court by Monday also and give opposing Counsel the benefit of that so that when we get together here on Wednesday morning we will know what each other is shooting at and what the reasoning and what the authorities are to back that up.

Mr. Hoddick: Yes, your Honor.

The Court: All that I want to do is to clear my mind of the thing so that I can feel that I am following the correct legal course.

(The Court adjourned at 11:20 a.m.)

October 7, 1949

(The Court convened at 10:05 a.m.)

Mr. Landau: If the Court please, Mr. Miho called me from one of the other courts and told me that he would be a little late and he asked me to appear in his matter.

The Court: Yes. Well, I have gone through the stuff [23] that you gentlemen submitted, and I come to the conclusion that the U. S. Supreme Court case, *Casey versus the United States*, statements made there and the reasoning of Justice Holmes disposes of the thing in my mind; that is, the question of this bill of particulars that is asked for. The Government admits that they can't furnish that bill of particulars. And this case here holds in effect clearly enough that it isn't necessary. Now, there is a dissenting opinion here by Justice McReynolds that expresses my past reasoning in the matter completely. It is the view that I took. But that is not the view that the majority of the court took, although it was a 4-5 decision. Four judges dissented. McReynolds wrote the most direct in point dissenting opinion to my view of it. I think it is quite illuminating, his view. He said,

"The provision under which we are told that one may be presumed unlawfully to have purchased an unstamped package of morphine within the district where he is found in possession of it conflicts with those constitutional guaranties heretofore supposed to protect all against arbitrary conviction and

punishment. The suggested rational connection between the fact proved and the ultimate fact presumed is imaginary.

“Once the thumbscrew and the following confession made conviction easy; but that method was crude and, I suppose, [24] now would be declared unlawful upon some ground. Hereafter, presumption is to lighten the burden of the prosecutor. The victim will be spared the trouble of confessing and will go to his cell without mutilation or disquieting outcry.

“Probably most of those accelerated to prison under the present Act . . .”

And that is referring to this Act making possession a *prima facie* illegality in having unstamped narcotics.

“Probably most of those accelerated to prison under the present Act will be unfortunate addicts and their abettors; but even they live under the Constitution. And where will the next step take us?”

That is about the way I would think. But Holmes, supported by three others, Sutherland, Stone and some other one, finds that with regard to the presumption of the purchase of the things manifestly not produced by the possessor, that there is a rational connection between the fact proved and the ultimate fact presumed. He cites that *Luria versus United States* case and *Yee Hem versus the United States*, and says,

“Furthermore there are presumptions that are not evidence in a proper sense but simply regulations of the burden of proof.”

He cites Greer versus the United States and says, "The statute here talks of *prima facie* evidence but [25] it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates."

And he confirms that which was first expressed by Wigmore in his treatise on evidence. So that appears to be the law. So far as I can see, I am bound by this decision here.

Mr. Landau: I am just wondering whether there isn't a distinction—it may not be a strong distinction but in the case I cited the facts were that this gentleman, who is a member of our profession, as I recall the facts, was in the habit of visiting some of his clients in jail and giving them a little bit of assistance.

The Court: That is the case——

Mr. Landau: And he was dispensing—there was no question about it—he was dispensing for a price, and there was evidence of dispensing for a price.

The Court: That is all true, and he was convicted. Now, just what he was convicted for I don't know, but they went up on this proposition, this very same thing, and this is the thing that the court decides. He is rambling around here and he shows in other parts of his discourse that the other man was guilty of this and that and the other thing. But this was the only thing that they were dealing with. This was the thing that went up as an error, and the Supreme Court evidently granted certiorari

from the Ninth Circuit [26] Court and dealt with it.

So that I am satisfied now that the thing is a closed book to me and every other Federal judge. Certainly it doesn't meet my reasoning, but I can't pit mine against the Supreme Court of the United States.

Mr. Landau: Of course no motions were filed in that case, although it probably might not make too much difference in view of the manner in which Justice Holmes went into the subject. But there was no motion made.

The Court: So far as I can see, that is the only thing that they had to deal with. It was that one,——

Mr. Landau: The presumption.

The Court: ——was that just one thing. The appellate there claimed that that was an un-Constitutional provision to make the mere possession of the thing as proof of evidence which the defendant had to overcome. And I don't quite see how they did it, but they did, against the four others who were strongly dissenting. I expect they had a lot of good, hot arguments among themselves. It was argued January 11th and not decided until April 9th. So I imagine they had a pretty difficult time with it, and finally the majority of them came to this decision. But the decision stands there today. And in view of that, I have got to deny the petition for a bill of particulars in those two cases.

Now, there is one other in which you said you could [27] furnish a bill of particulars?

Mr. Hoddick: And I have, your Honor.

Mr. Landau: That has been furnished, if the Court pleases. That is in Criminal No. 10,254. I might indicate to the Court that in the case of 10,256 there was only one count. And your Honor's ruling, of course, takes care of that. In 10,253 there were two counts. And your Honor's ruling takes care only of Count 1. And I think just for the purposes of the record we ought to get an order as to Count 2.

The Court: Yes, I have it before me. The first one alleges a felonious purchase.

Mr. Hoddick: Of opium and cocaine. The second count alleges a felonious purchase of marihuana.

The Court: Feloniously acquiring. Well, acquiring, is that the thing set out in the statute as unlawful?

Mr. Hoddick: That is in the statutory language.

The Court: Well, aren't they both the same?

Mr. Landau: There's a similarity, although I think that this particular case, this count does not come within all fours of the first count—in Count 1 he is not charged with being a transferee required to pay a tax. All that is, is that he purchased it and you have to prove possession, and that is automatically, according to that case, a purchase. But in 2593 it says, [28]

"It shall be unlawful for any person who is a transferee required to pay the transfer tax to acquire or otherwise obtain marihuana."

Now, their theory is in this case, of course, that all they have is the possession and that under the statute——

The Court: What particulars are you calling for in the second count, then?

Mr. Landau: I ask in what manner the defendant became a transferee required to pay the special tax, the time, place and circumstances when he did become a transferee, and if there is any distinction that they are making between “acquired” and “otherwise obtained,” just what it is.

The Court: Well, the Government’s answer is, I presume, the same in that case, that they are just not in a position to specify.

Mr. Hoddick: That is correct, your Honor, the statute making it a crime to unlawfully acquire or otherwise obtain marihuana, also makes possession of that marihuana in a slightly different language and proof that any person—the statute reads,

“... and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by Section 2591 to be retained by him, shall be presumptive evidence of [29] guilt under this section and of liability for the tax imposed . . .”

One statute uses the language of *prima facie* evidence and the other presumptive.

The Court: Now, you say you can’t produce that?

Mr. Hoddick: No, your Honor. We will have to go to trial.

The Court: That is identically to my mind the same position as the other. I can't require the Government to produce something which they admit they can't produce. They are clearly standing on this *prima facie* evidence. This is a proper case for a jury, and naturally I'd have to instruct them according to the statutory law. We all think at different times that the jury doesn't pay much attention to the court's instruction about the law——

Mr. Landau: May we note an exception on behalf of both of these defendants in both cases to your Honor's ruling?

The Court: Yes. What else is there?

The Clerk: That's all we have, your Honor.

The Court: Well, I'm sorry we necessarily had to spend so much time getting to the bottom of what the courts' rulings have been on this. I am satisfied that this hasn't been overthrown by any subsequent decisions.

Mr. Landau: I checked on that. No, your Honor.

Mr. Hoddick: If your Honor please, I found a case of [30] *United States versus Van Wageningen, Inc.*, in 34 *Federal Supplement* 735, and in that case the Government came in and stated that they did not have the particulars requested in the bill of particulars and were unable to furnish them. And the court ruled that they could not require the Government to furnish the particulars but that if the Government intended to introduce direct evidence at the trial of the case then they should turn it over to the defendant. And we will do that in this case, your Honor.

The Court: That sounds like square shooting.

Mr. Hoddick: Also, does your Honor care to set these matters down for plea?

The Court: Oh, there had been no plea entered?

Mr. Landau: No, your Honor, there has been no plea in these cases.

The Court: Are the defendants in a position to plead now?

Mr. Landau: Well, I think in view of the fact that we can't get the information I would request the Court's permission to discuss the matter with the defendants and find out whether they are in a position to plead.

The Court: Suppose you enter a plea, then, Monday morning at nine o'clock. The calendar will change at ten o'clock Monday.

Mr. Landau: Yes. [31]

The Court: Nine or nine-thirty.

Mr. Landau: We start a jury case before Judge Parks at ten o'clock. I see no reason why we can't be up here for a few minutes for that purpose.

The Court: All right.

(The Court recessed at 10:28 a.m.)

REPORTER'S CERTIFICATE

I, Albert Grain, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of proceedings in the case of United States of America versus Winston Churchill Henry, in the

matter of motion for bill of particulars, held on September 28 and October 7, 1949, before the Hon. Delbert E. Metzger, Judge.

/s/ ALBERT GRAIN.

Mar. 16, 1950.

[Endorsed]: Filed April 20, 1950 U.S.D.C.

[Endorsed]: Filed May 1, 1950 U.S.C.A.

In the United States District Court for the
Territory of Hawaii

Criminal No. 10,253

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WINSTON CHURCHILL HENRY,

Defendant.

Before: Honorable J. Frank McLaughlin,
Judge, and a Jury.

APPEARANCES:

HOWARD K. HODDICK, ESQ.,

Assistant U. S. Attorney,

Appearing for Plaintiff;

O. P. SOARES, ESQ.,

Appearing for Defendant;

SAMUEL LANDAU, ESQ.,

Appearing for Defendant;

WILLIAM Z. FAIRBANKS, ESQ.,

Appearing for Defendant.

PROCEEDINGS

Honolulu, T. H., November 1, 1950

The Clerk: Criminal No. 10,253, United States
of America vs. Winston Churchill Henry. Hearing
on motion for transfer of case.

Criminal No. 10,254, United States of America, Plaintiff, vs. Winston Churchill Henry, Defendant. Hearing on motion to transfer the case.

The Court: Are the parties ready?

Mr. Hoddick: Ready.

Mr. Landau: If the Court pleases, Counsel was to let me know before today; he indicated he was going to give me about a week's notice as to whether or not the motion was to be contested on either one of the two grounds here in question, either on the question of law or the question of evidence. Not having heard from him, I assumed there was going to be no contest on the motion. However, I am informed that he has been advised to contest the matter, at least on the question of law, if not on the question of the evidence itself. Because of the situation that I was not aware of, I am prepared—I am not prepared at the moment either to bring in any evidence or on the legal problem of law showing that I am permitted to ask for this transfer.

I have spoken to Counsel before Court convened, and he had forgotten to notify me. I, frankly, am not prepared to go forward on either ground, and with the Court's indulgence I would like to get a continuance so that I can prepare this matter, as I would have if the matter were contested.

Mr. Hoddick: May it please the Court, at the time Mr. Landau served the notice of motion upon me, I do recall that I advised him that if we were to have a contest of the law on this motion I would advise him in advance of the hearing. I did not know what our position would be prior to receiving

the word from the Department in Washington, which we did not receive until the latter part of the morning by cable, and they simply advised us to put up whatever defenses we could. Consequently, I have been unable to give Mr. Landau the notice which I advised him I would, and I am not averse to a reasonable continuance in the matter, although I am ready to go ahead at this time, if that is agreeable to the Court.

Mr. Landau: I would like to get the continuance so I can come up at least on an equal level with Counsel, so I can cite some authorities to the Court.

The Court: The legal problem isn't anything. The rule is clear. I should say the big problem is the facts and the evidence.

Mr. Landau: I will go ahead with what evidence I have here today, if the Court pleases.

The Court: I am not desirous of compelling you to do so in view of the confusion that has existed. All I am [2*] saying is it doesn't seem to me the legal problem is anything like the factual problem. At this point all I really want from you is an expression of how much time you want.

Mr. Landau: In checking my calendar, if the Court pleases, I find that I am free on Thursday, the 10th, in the afternoon, if the Court and Counsel are free.

Mr. Hoddick: It is satisfactory to the Government.

The Court: All right, that is a little bit longer than I would like. We have a trial starting Monday,

* Page numbering appearing at top of page of original Reporter's Transcript.

but we will reserve Thursday afternoon, November 10.

Mr. Landau: Counsel just informed me I have a matter starting on the 9th.

The Court: Well, go backwards towards the first.

Mr. Landau: We can't come here on the 9th, because your Honor has that Papoose matter on the 9th.

The Court: That shouldn't take too long.

Mr. Landau: I am in Judge Moore's court on the 8th at 1:30. Does the Court want to set this down?

The Court: How about Friday of this week?

Mr. Landau: That is calendar day, if the Court please, over in Judge Parks' court room.

The Court: How long does that take?

Mr. Landau: We have a sentence, which puts us down at the end of the calendar. It will be around 3 or 3:30 before we get away. [3]

The Court: You name your time; it will be all right with the Government and with me.

Mr. Landau: Let's make it the 9th, if the Court pleases. If Judge Parks insists that we go in the afternoon, I will have to tell him I am ordered to be here at that time.

The Court: I will enjoin him if you want.

Mr. Landau: And that will be about 2:30, then, won't it, because it will take at least a half hour for that Papoose?

The Court: You are in that, too, aren't you?

Mr. Landau: Yes, your Honor.

The Court: Let's move the Papoose up to 1:30.

Mr. Landau: That is all right.

The Court: Move the Papoose, Mr. Clerk, up to 1:30 and we will take this up to follow, approximately at 2 o'clock. All right?

Mr. Landau: Thank you.

We are apparently going to be confronted with a problem at the next hearing with reference to the taking of testimony, especially of Mr. Fairbanks. Mr. Fairbanks is going back to the hospital Monday night, and will be gone for some time, so I thought perhaps we might meet the issue now as far as that testimony is concerned. There is a possible question of ethics and a possible question of hearsay testimony, and I will be frank, I will make an offer of proof now that Mr. [4] Fairbanks will testify he has spoken to people and people have made remarks to him about this case indicating prejudice among the populace. As I say, we have a question of ethics there because of Counsel taking the stand as a witness. And I intend not only to put Mr. Fairbanks on, but Mr. Soares and myself on that point. Now, whether or not that type of situation is actually covered by our ethical code is the situation. We are not talking about the merits of the case; we are talking about the underlying undercurrent and the feeling of the community, of which we naturally have been cognizant. We are probably in a better position than Mr. Smith and Mr. Jones out in the street to give the Court a true picture of the cumulative effect.

And then again, I say, Counsel, I understand, will object to the testimony on the ground that it is hearsay. Now perhaps it would be a good time to meet that issue right now, and with the Court's permission I will put Mr. Fairbanks on and as each problem comes up, we can thrash it out at that time.

Mr. Hoddick: That meets with the approval of the Government.

The Court: On the problem of the testimony by Counsel, presenting the problem of legal ethics, my recollection of the rule is that it is a canon of ethics which has this exception, that Counsel in a case may testify when he is [5] the only possible available witness. It would seem to me offhand, too, that since it is not a rule of evidence, but is more a canon of ethics, that it is upon you gentlemen to decide for yourselves whether you want to take the risk or not.

Mr. Landau: We don't want to violate any canons of legal ethics, if the Court pleases, except that before we have the opportunity of checking it to see whether or not we would be violating any code, Counsel, of course, will be in the hospital, and if we decide, under the peculiar circumstances of this case, it would not be a violation, he will not be available as a witness. However, I understand Counsel is not willing to assume the risk at this moment without further check of that matter.

The Court: If I were advising him, I wouldn't advise him to do it.

Mr. Fairbanks: I would much prefer to check the canon myself.

The Court: I think it is too risky, if I may give you a bit of unsolicited advice.

Mr. Landau: It is a matter we have considered and would like any suggestions we might be given.

The Court: I will be available to meet the convenience of Government and Defense Counsel at any time, and if it becomes necessary to take Mr. Fairbanks' testimony prior to the time he goes back into the hospital, I will make myself [6] available. I think this thing should be moved along expeditiously, and I will make myself available.

Mr. Landau: Thank you.

The Court: I will even come down Saturday, if you want.

Mr. Landau: We will let the Court know.

(Thereupon, at 2:25 p.m., November 1, 1949, an adjournment was taken until November 9, 1949.) [7]

November 9, 1950

(The hearing was resumed at 1:35 p.m.)

The Clerk: Criminal No. 10,253, United States of America versus Winston Churchill Henry; and Criminal No. 10,254, United States of America versus Winston Churchill Henry, for hearing on motion to transfer case from the District of Hawaii.

Mr. Landau: If the Court pleases, I would like to submit this motion, that is, on the failure of the Government to file counter-affidavits on the question of prejudice in the community. I refer to the case of United States versus Reece which is

cited in 280 Federal at 913, the particular reference being at page 916.

“Coming to the motions to change the place of trial. The affidavits of the defendant, his counsel, and a number of other individuals set forth with considerable detail reasons tending to show that a spirit of hostility and prejudice has been excited against the defendant, growing out of the failure of the bank of which he was president, and tending to show that that prejudice has ramifications to a very considerable extent throughout the whole of the division in which the indictments were returned, and it may be said, without more, that, accepting these affidavits for all they tend to show, they are sufficient *prima facie* to make out a case where the rights of the defendant would be unduly jeopardized by compelling him to go to trial in that district. These affidavits have not been met by the Government by any countershowing by affidavits on the part of the United States attorney and presumptively because no such showing was available.”

In other words, apparently there is a duty on the Government by counter-affidavit to show that no such hostile prejudice is in the community.

Also, I call the Court's attention to the case of Kersten versus United States, in 161 Federal 2nd, 337, where, although the motion was denied, the court there on page 339 stated,

“The motion was verified, and averred that the news items and newscasts had created such a prejudice against Kersten in the District of Colorado

that it would be impossible for him to have a fair and impartial trial by a jury drawn from such District. It was also supported by affidavits. The United States introduced counter affidavits.”

In other words, there is considerable justification and reasoning from these two cases that there is a duty upon the Government to file counter-affidavits; and failing to do so, we have made a *prima facie* case warranting the granting of [9] the motion.

Mr. Hoddick: It is my understanding, your Honor, that the Government can come in either with counter-affidavits or can come in with witnesses to rebut the evidence set forth in the affidavits filed by the movant. And in this case it is the Government's intention to call witnesses to the stand to show that there are at least available in this community persons who are eligible to serve on a jury, if they were called, who would not be so prejudiced by virtue of the wide publicity that the defendant has received in this community and who could serve fairly and impartially.

Mr. Landau: I think this situation is rather similar to the civil rule, if the Court please, on summary judgments where counter-affidavits would be necessary.

The Court: Well, what is the rule number?

Mr. Hoddick: Rule number 21, your Honor.

The Court: It doesn't say a thing about affidavits, does it?

Mr. Landau: No, your Honor, it doesn't say anything except that we have judicial determination that apparently——

The Court: That sets the rule.

Mr. Landau: Well, 161 Federal 2nd, 339, was decided June 16, 1947.

Mr. Hoddick: But all that case holds, Mr. Landau, is that in that case they did file counter-affidavits. [10]

Mr. Landau: That's right.

Mr. Hoddick: No holding by the court that counter-affidavits be filed.

Mr. Landau: But we have the authority of the prior case, United States against Reece, which shows that an affidavit, that counter-affidavits are necessary. And they were, in fact, filed in the Kersten case.

Mr. Hoddick: As a matter of fact, I don't think that your Reece case actually holds that, Mr. Landau.

Mr. Landau: Read that.

Mr. Hoddick: This is the first time I have seen it. That is in the District Court in the District of Idaho, in 1922. On this score, your Honor, in going over the Digest I noted that in some cases counter-affidavits were filed and in others they were not. In this case we preferred to wait and bring witnesses into the courtroom and testify directly to the Court, and where it would be possible for counsel to cross-examine them.

The Court: In the absence of some provision in the rule providing for the handling of a motion under this rule like unto the handling of a motion for summary judgment, I cannot at this time, for

lack of affidavits filed by the Government, take the motion. The motion is called today for a hearing, and I presume at this time both sides are prepared to introduce evidence pro and con as to whether the motion should or [11] should not be granted.

Mr. Landau: May I take an exception to that?

The Court: You may.

FRED HOWARD

a witness in behalf of the Defendant being duly sworn, testified as follows:

Direct Examination

By Mr. Landau:

Q. What is your name, please?

A. Fred Howard.

Q. Where do you live, Mr. Howard?

A. I live at 366-B Hobron Lane.

Q. And where are you employed?

A. I was born in Arkansas.

Q. No, where are you employed?

A. Employed, the Civil Service Commission with the Army.

Q. With the Army? Mr. Howard, in the past few months have you had occasion to have people talk to you about one Winston Churchill Henry?

A. I have had three ladies and one man, and I have been in socials and I have also heard people, you know, speaking about it.

(Testimony of Fred Howard.)

Q. Well, now, will you tell the Court what people have told you concerning one Winston Churchill Henry? [12]

Mr. Hoddick: I object, your Honor, on the grounds that anything this man says what people told him concerning Winston Churchill Henry is hearsay and is not admissible in evidence.

Mr. Landau: Now, we must admit that all the testimony, or most of the testimony, concerning this matter will be hearsay, what people have said, what he has gathered therefrom, what conclusions he has arrived at.

Mr. Hoddick: I won't admit such thing. If you want to prove prejudice in this community, you will have to show that prejudice in the witnesses that you call to the stand.

Mr. Landau: That's absurd. I will have to call 550,000 people to do that. I am trying to prove a situation which exists in the community as evidenced by statements that have been made to individuals in the community. It's the only way we can prove it. Sure, we may be able to find 20 people that aren't prejudiced. We want the general tenor, the general opinion in the community.

Mr. Hoddick: Your Honor, if I might suggest, I think that this man could testify as to statements made to him to show that such statements had been made, but not to prove that prejudice existed in the minds of the people who made the statements. In other words, he can testify of his own knowledge that he heard these statements, but

(Testimony of Fred Howard.)

he can't state as to their truth or veracity, and I don't believe that they can be considered by the Court as reflecting the existence [13] of prejudice in the community.

Mr. Landau: All this witness and any other witness we put on will testify is to statements that were made, which counsel says we can do. We are not going to infer that those people would testify that they were prejudiced. But based on those statements which were made to this witness, he can render an opinion as to whether or not prejudice does or does not exist.

The Court: All right. Go ahead on that basis.

Q. (By Mr. Landau): Will you talk slow and loud, please?

A. After overhearing the conversation, why, the people that made these statements——

The Court: You are talking about the three ladies and one man? I want to know. It that what you started off telling me about?

Q. Talk about the three ladies and one man first.

A. O.K. That was a lady which had just spoke to me this morning. She says, "You know this Winston Churchill Henry?" She says, "You know, I think he has a lot of nerve. People like him shouldn't be allowed to come to the Islands, nor bring—criminals like that shouldn't be allowed to come to this Island to live. He should be run off."

"Well, I know him; he's been a pretty nice fellow, because, you know, I'm not sure as to his vice." [14]

(Testimony of Fred Howard.)

So she says, "Regardless of circumstances they say he did it, and the fact that they say that, I believe it. I read this and that in the paper." And she says, "I believe what I read. In a case like that I think he should be run off."

Well, I never knew this gentleman's first name. How I come to know his first name, there was a girl; she asked me, did I know Winston Churchill Henry, and I says, No, I don't. I heard the name before. It's very familiar. She showed me the paper with the headline. She says, "Did you read it?" I said, "No." I said, "No, I haven't. Let me see it." So I read about it. And she said, "Well, don't you think that's awful?" I said, "Well, in a way of speaking I think it is." And she says, "Well, I say I'm not familiar with the case but just from what I read in the paper it sounds awful." And she says, "Don't you think they ought to put him in jail and lock the key away?" And I said, "I'm not familiar with all the circumstances; maybe he's guilty and maybe not. As far as that's concerned, I'm not the one to decide."

O.K. Another time I was out at a social with a mixed group and I overheard two people talking, and one says, "What do you think about this case of Winston Churchill Henry?" And the other one says, "Well, look, they ought to chase him off the Islands and put him in jail." And the other one said, "Well, he should—" —I can't remember the

(Testimony of Fred Howard.)

exact—that's about all I can remember. I have heard quite numerous remarks about that.

Q. Have you been recently in one of the outside islands, Mr. Howard?

A. Recently what?

Q. In one of the outside islands?

A. No, I haven't. Ever since I came here I have been here.

Q. Have you been in Hilo at any time?

A. No, I haven't.

Q. You said something about Hilo to me outside.

A. No, it wasn't I.

Q. Oh, it wasn't you. That's correct. Have you heard any other statements that you can recall about this gentleman?

A. No, not that I can remember.

Q. Well, now, based upon the statements which have been made and the remarks that have been passed in your presence, Mr. Howard, do you have an opinion as to whether or not people in this community are prejudiced against Mr. Winston Churchill Henry? Just answer that question Yes or No.

Mr. Hoddick: I object.

A. Yes.

The Court: When the lawyers are objecting, just hold off. [16]

Mr. Hoddick: I object to any answer that the witness might give or might have given. I move that the answer be stricken. The man is called upon

(Testimony of Fred Howard.)

to render an opinion, and it is opinion evidence, and I don't believe it is admissible. There is no showing that he is competent perhaps to determine whether there is a prejudice within the community. You'd have to invite an expert, somebody who knows something about perhaps mob psychology or something on that order. There is no showing that this witness, on the basis of free statements which he heard made, is able to express an opinion which will bear any weight in this Court as to whether such prejudice exists.

The Court: Well, he can certainly state whether or not he has, as a result of assembling the thoughts of people whose views he has illustrated by his testimony—he can state whether or not he has an opinion. Whether or not he'd be allowed to state what that opinion is, is another thing.

Mr. Landau: May I address myself to that problem at this moment?

Mr. Hoddick: I perhaps anticipated the second question, your Honor.

The Court: Let's get at it squarely.

Q. (By Mr. Landau): Do you have an opinion, Mr. Howard, as to whether or not—— [17]

A. Yes, I do.

Q. Don't tell us what the opinion is. Just say Yes or No. Do you have an opinion?

A. Yes.

Q. All right, now, here is the question, Don't

(Testimony of Fred Howard.)

answer it until the Court says you may. What is your opinion as to whether or not the defendant, Winston Churchill Henry, could get a fair and impartial trial in this community?

Mr. Hoddick: I will object to that question on the same grounds that I previously stated in connection with the previous question.

Mr. Landau: Prejudice, if the Court pleases, is opinion. We don't need an expert to render an opinion on this matter. The man is a resident of the community. He is perfectly justified, as the Court or I would be, to be able to tell and render an opinion as to whether or not there is prejudice or there is not prejudice against a certain fact or certain situation or certain individual.

Mr. Hoddick: May it please the Court, it is true that prejudice is opinion, and this man could undoubtedly be asked directly whether he himself is prejudiced or not, but I do not think that this man is competent to give an opinion as to what the tenor of prejudice or non-prejudice is in the entire community, which is what is at issue here before your Honor today. [18]

Mr. Landau: We are trying to show prejudice in the community, if the Court pleases. We can only do it by people who have been in the community. We can't bring everybody in the community to testify that they have or have no prejudice against this man.

(Testimony of Fred Howard.)

Mr. Hoddick: You can bring in a good sampling and you can ask them questions which they are competent to answer.

Mr. Landau: We would be here from now until doomsday if we were to do that.

The Court: Well, the question, as I understand it, is whether or not, based on his prior testimony, he has been able to form an opinion as to whether or not with regard to this case in this Court the defendant can get a fair trial.

Mr. Landau: That's right.

The Court: Before a jury. I don't feel that there is a foundation for expressing an opinion. I am not so bothered with his voicing an opinion if he has made a fair sampling and if he shows some knowledge of the judicial process.

Mr. Landau: Your Honor, it is impossible for us from one witness—one at a time—to have him come in and say that he can talk for the entire community. He can talk for some members of the community that he has been in contact with. He has given you just a little segment. We will have somebody else to give you a little more segments. Whether or not [19] we are going to be able to give you enough so that we could have one hundred per cent of the community, I don't know. I don't think it is necessary.

The Court: Well, he has talked about three ladies and one man and one woman. And women aren't allowed in our juries. And as to one man. I don't know whether he is a resident and could be

(Testimony of Fred Howard.)

summoned as a juror or not. I don't know if this man knows a thing about the judicial process against which to evaluate these——

Mr. Landau: I don't believe, if the Court pleases, that whether or not these people are citizens or not citizens, whether he knows anything about the judicial process, is at all material in this case. He wants to give your Honor a picture, or at least something that is in the air, which he, in his little way, has been able to gather. In other words, it is not anything that is tangible. It isn't anything that you can fix your finger on. It is something that is flitting and floating around.

The Court: Well, you are asking him his opinion as to whether or not, having formed an opinion from this sampling, whether or not in his opinion this defendant in this case and in this Court could get a fair trial. That necessarily involves some knowledge of the judicial process, the minute you talk about a fair trial.

Mr. Landau: Well, let me rephrase the question and [20] eliminate the——

The Court: Restate your question.

Q. (By Mr. Landau): Mr. Howard, as a result of these conversations that you had, these matters that you have overheard, do you believe or do you have an opinion as to whether or not there is prejudice in the community against Mr. Henry, and if there is, if your answer to that would be yes, will you tell the Court what your opinion is as

(Testimony of Fred Howard.)

to whether or not there is prejudice or no prejudice against the defendant in the community?

The Court: Now, just a minute. It is a double question. I am going to object to that myself. One at a time.

Mr. Landau: Let's go back, then. Shall we start from the opinion, where he has an opinion?

The Court: Yes.

Q. Will you tell us what your opinion is, Mr. Howard, as to whether or not prejudice exists in the community against this Defendant?

Mr. Hoddick: And I object to that, your Honor, on the ground that there is not a sufficient foundation laid to show that this man is capable of testifying as to what the general tenor of prejudice or non-prejudice is in the community. As a matter of fact, the statements which he has quoted of these ladies and the man as saying does not reflect [21] in any way as to whether those individuals, if they were called and sworn into the jury box, would say yes in response to whether they could give the defendant a fair and impartial trial.

The Court: Well, that isn't the question that he has been asked. The question he is being asked is simply whether or not, as a result of what he has heard, does he have an opinion as to whether or not there is in this community prejudice against this defendant.

Mr. Hoddick: And he has said yes, he does have an opinion. And I do not think he should be per-

(Testimony of Fred Howard.)

mitted to give that opinion because I don't think there is an adequate foundation laid to show that he can have any idea as to what, as to whether prejudice exists or not.

The Court: Well, wouldn't that go to its weight? I am going to let him answer the question. I am inclined to think the objection is good but I am going to let him answer the question nevertheless.

Mr. Landau: What is your answer, Mr. Howard?

A. From what you read in the paper and from what you hear about in the public, naturally there must be a great form of prejudice. I'm sure that each and every one, I'm sure you walk the street and ride the bus, and I'm sure if each and everyone was honest with himself I'm sure he can say that they have heard such things spoken against this man [22] Winston Churchill Henry. Now, so far as prejudice, I can mention quite a number of instances, but due to the fact that the gentlemen of high standards—perhaps you don't, I'm sure you don't associate on the same plane, that is, you don't get around in the same districts, well, naturally you won't see and hear as much prejudice as I do. And naturally you won't understand. And then the chances are, if you do see or hear some, it is some particular one in the courthouse that might hear it and see some of those things but don't mention it. This is something that is floating around in the air.

Q. In your opinion, now, you believe that there is prejudice against the defendant in the community?

(Testimony of Fred Howard.)

A. Well, from the conversations and from what I hear then, I would say it is, not that I believe.

Mr. Landau: All right. Your witness.

Cross-Examination

By Mr. Hoddick:

Q. Mr. Howard, how long have you been here in the Territory?

A. I have been here approximately one year and nine months.

Q. And if you were qualified and were called to serve upon a jury which was to try Henry on one of these Federal charges, and you were asked whether you could give the [23] defendant Henry a fair and impartial trial, despite the newspaper articles and the publicity and the conversation of people in the community——

A. I don't quite understand you. Speak a little louder.

The Court: He doesn't hear you. Are you a little hard of hearing, Mr. Witness?

Q. If you are qualified to serve on a jury in the Territory, and you were called upon to serve on a jury here in the Federal Court that was trying the defendant, Winston Churchill Henry, for a Federal crime, and you were asked, you would be asked before you were placed in the jury box as to whether you could give the defendant Henry a fair and impartial trial, despite the fact that he has had all of this publicity, and you heard all of these

(Testimony of Fred Howard.)

conversations and you have read the articles in the paper, what would your answer be?

Mr. Landau: Just a minute. Don't answer that question for a moment. I object to the question, if the Court please, on the ground——

The Witness: I will answer it.

Mr. Landau: Just a minute. I don't want you to answer it. I don't know what your answer is going to be. I want to get an objection in. I object to the question on the ground that it isn't the issue in this case. It isn't what [24] an individual juror would say, a man that would come up on the stand and say, well, I don't have any prejudice, I don't believe what the newspapers say and I am not influenced by it. It is not what an individual person would say as to his own prejudice. It is what prejudice is there in the community.

Mr. Hoddick: This man is a representative of the community. He is a part of the community. And what his own prejudice is is a reflection of what the community prejudice is. We are trying to do in a sampling sort of way what could only be tested properly in this Court by bringing in 530,000 people, as Mr. Landau pointed out. If we can find in this community 12 men who can grant the defendant Winston Churchill Henry a fair and impartial trial and who are not prejudiced, then this case should not be transferred to another district. It is ordinarily inferred by the Court, if there is a sufficient showing of prejudice in the community, that that cannot be done——

(Testimony of Fred Howard.)

The Court: The witness didn't testify as to himself on direct examination. I think you had better confine your cross-examination to what he testified to. The question is not what he would do. The question is as to whether or not his opinion has any significance. In other words, he testified as to what his opinion was as to whether there was prejudice against this defendant in this community. You [25] start off on your cross-examination treating him as if he were called as a juror. He didn't testify about that. We are talking on the general level rather than individual. I think you had better cross-examine him on what he testified to.

Q. (By Mr. Hoddick): Mr. Howard, you first testified that you heard, that you spoke with a lady who told you that the defendant Winston Churchill Henry—I think you used the term “should be run off,” ought to be gotten out of the Islands; and you protested, after all, you didn't know whether he was innocent or guilty at this stage.

A. I didn't protest. I made a statement.

Q. Now, I would like to know, where did you have this conversation?

A. Beg pardon?

Q. Where did you have this conversation with this lady?

A. That I won't mention. You will have to get the people's permission first.

Q. The Court will instruct you, I believe, to answer.

(Testimony of Fred Howard.)

A. I would have to get the people's permission whether or not they would like to be involved.

Mr. Landau: Mr. Howard, you are not asked the names of the people, but the question is, where was this conversation [26]

A. It is in here in Honolulu, naturally.

The Court: Just a minute.

A. But what particular place——

The Court: Are you hard of hearing?

The Witness: Slightly.

The Court: You had better come up here so we can hear you.

Q. (By Mr. Hoddick): When did the conversation take place, Mr. Howard?

A. This morning.

Q. Where? A. I won't care to mention.

Mr. Hoddick: May it please the Court, this runs to the credibility of the witness' testimony and I think he should be required to answer any questions concerning the details pertaining to these various conversations and conversations which he overheard that he testified to.

Mr. Landau: If the Court pleases, that comes down perhaps to one of the big difficulties which we have had in this case; the refusal of people to get involved as witnesses in this matter has been one of the difficulties; that counsel for the defendant by the canons of legal ethics are not properly permitted to testify in a matter in which they appear as counsel; and people around the community who

(Testimony of Fred Howard.)

have indicated [27] by statements of one kind or another on this matter, have refused to appear as witnesses; and we asked whether they would appear under subpoena to testify as to this prejudice and they have clearly stated that they would deny that they made any such statement to the party questioning them, counsel and Mr. Soares. And I think, however, that this particular question could be answered, whether it was in Honolulu or what particular street. But I am now anticipating the next question, the names of these people.

The Court: Let's deal with what is before us.

Mr. Landau (to the witness): Answer the question, just where in Honolulu, what street?

A. Well, to mention that, perhaps that would, perhaps that would—perhaps I would have to tell just where it was. Look, I have the name, I know the name of the lady, and if the lady, if she were subpoenaed I'm sure she would say the same thing because she's that type of a lady. But as I expressed myself I'm not sure that the lady would like to be involved.

Mr. Hoddick: Excuse me, Mr. Howard. May it please the Court, and Mr. Landau, I intend to further cross-examine this witness as to all the details surrounding these conversations and the social meeting which he said he attended, and I think we might have a ruling of the Court now as to whether I shall be permitted to and whether the witness will [28] be required to answer the questions or not.

(Testimony of Fred Howard.)

The Court: The lawyer just told him to answer the question. Mr. Witness, you testified on direct examintaion about these conversations. You had better answer the questions now whether you'd like to or not.

The Witness: You see, the people——

The Court: I know how you feel, but you gave that direct testimony and now the other side is entitled to get some of the details. And whether you like it or not, you have got to answer. Is there any basis here for advising him as to his Constitutional rights?

Mr. Landau: I don't know, your Honor.

The Court: You are the attorney on that side. You watch it.

Mr. Landau: All right.

The Court: I won't force you to that point. Now, the question is simply, where did this conversation with this lady that you mentioned take place on this morning?

The Witness: It happened at Fort Shafter.

The Court: At Fort Shafter?

Q. (By Mr. Hoddick): In what office, Mr. Howard?

A. Well, I may as well tell you her name, as I told you.

Q. I will start off—what is her name? [29]

Mr. Landau: I will object to it, if the Court pleases, on the ground that we are not concerned

(Testimony of Fred Howard.)

with individuals who have made statements. We are only concerned with whether or not statements are made. While it is true that counsel is asking the question on the question of credibility to determine whether or not this witness knows what he is saying, we do have an unfortunate situation, as I indicated to the Court, about these people not wanting to become involved in this matter. And there is an awful lot of it here, your Honor; and statements that were apparently made either in conversation or under conditions where it would not be believed that the persons' names would be brought into the case. I think that that is a confidence which this Court could ask this man, this witness, to keep.

Mr. Hoddick: I don't know of any such privilege, Mr. Landau.

Mr. Landau: Well, it is an unusual situation. It may be an unusual privilege, Counsel.

The Court: Well, I am reluctant, unless it is absolutely necessary, to force this witness to tell us the person's name; unless there be other ways of testing as to whether or not he is telling us a story out of whole cloth or whether these people really exist.

Mr. Hoddick: May it please the Court, we may desire to bring this lady down here and place her on the stand. [30] How are we to do it unless we know who she is?

Mr. Landau: That is just one of the reasons why

(Testimony of Fred Howard.)

he doesn't want to give her name. He doesn't want to get her involved.

Mr. Hoddick: I sympathize with what your witness desires and I sympathize with the problem that you face in bringing the witnesses to this Court, but I don't think we can choke off our rights to any cross-examination of this witness with the intention of showing that the opinion which he has rendered here in court is not a proper opinion or is not a correct opinion.

Mr. Landau: Well, I have told these witnesses, if the Court pleases, that in my opinion they do not have to answer specific questions as to names. I will not bring witnesses on the stand under any false impression or bring them under false colors. If this man is going to be required to divulge the names given to him in confidence, if the Court pleases, I will withdraw him as a witness.

The Court: I haven't heard anything about names given him in confidence. All I know is that the man said he had a conversation this morning with a lady. He is being asked where, and now directly who. There is nothing about confidence here that I know of.

Mr. Landau: He said something about the person not wanting to become involved in this case. [31]

The Court: Well, there are lots of people that don't want to become involved, but if they say and do things, whether they like it or not, maybe they are involved.

Mr. Landau: Well, if this witness who is em-

(Testimony of Fred Howard.)

ployed there is going to feel embarrassed by answering a question as to names, any specific person, I will withdraw him as a witness, if the Court pleases, if Counsel forces the issue. I am not going to have a witness come on the stand and testify as to a matter where I have indicated to him he would not be required to divulge the names of people who have made statements to him.

Mr. Hoddick: I am not certain that it rests within the privilege of Counsel at this stage in the proceedings to withdraw the witness. I would suggest that the Government will have no objections if you will agree to withdraw the witness and stipulate that the testimony which he has given here in the court will be stricken from the record, and I will ask him no further questions.

Mr. Landau: May we withdraw this witness for the time being, if the Court pleases, subject to striking out his testimony, and let us go on further?

Mr. Hoddick: No, your Honor, I will object to that. If cross-examination of the witness is to continue, I'd like to do it at this time while what he said is fresh in his mind and fresh in ours. I'm afraid he'll have to answer the [32] question or either withdraw and strike the testimony——

Mr. Landau: Just a moment. (Mr. Landau confers with the Defendant.) Mr. Henry agrees with me that there should be nothing to prejudice this man with his employment. And we will withdraw the witness.

(Testimony of Thomas Lampley.)

The Court: The witness is excused and his testimony is stricken. You are excused.

(Witness excused.)

THOMAS LAMPLEY

a witness in behalf of the Defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Landau:

Q. What is your name, please?

A. Thomas Lampley.

Q. And where do you live, Mr. Lampley?

A. 1508-B Emma.

Q. And what is your business, Mr. Lampley?

A. I am a prize manager and I work for the Honolulu Gas Company.

Q. Now, during the past couple of months, have you heard people make statements or pass any remarks about one Winston Churchill Henry?

A. I have.

Q. Will you tell the Court some of those remarks [33] which you have heard, statements that have been passed in your presence?

Mr. Hoddick: At this time, your Honor, I am going to object to the admission of that testimony as hearsay.

The Court: Overruled. It is definitely hearsay but I will let it in.

(Testimony of Thomas Lampley.)

A. Well, on different occasions in my business as a fight manager I get around in different places and I come in contact with a lot of people, and naturally read about Winston Churchill Henry in the paper, and me being a negro they always come up and ask me do I know him, and I tell them, yes, I know him. And even without me knowing their name they just strike up a conversation and start talking about him and say, Oh, well, they think he's got some money; they are going to break him; they've already got his time set; they said they already made up their minds about his time, but after they break him they are going to send him up.

Q. Have you heard any other remarks indicating anything as to whether or not people had prejudged his guilt or innocence of these offenses with which he is charged? A. Well——

The Court: Wait a minute. Let's stick to ours in here. We only have one case, two cases, one defendant that you are concerned with. We are only concerned with this litigation [34] in this Court.

Q. All right. Have you heard people make any remarks indicating that they have prejudged the guilt or innocence of this defendant with reference to the cases which are in the Federal Court?

A. Well, when I was in Hilo in July, I came in contact with quite a few people down there and they starts discussing about Henry, what they read in the paper. And somebody said, "You know this character?" "Yes, I know him." "Well," they

(Testimony of Thomas Lampley.)

said, "what do you think they are going to do to him?" "That I don't know." "Oh, they'll get him. They are just taking their time. Just the same thing once they are here in Honolulu. As soon as they get his money then they are going to send him up. I know what they'll do for him around here." That's just what they said.

Q. Well, after these remarks, the statements that have been made to you and in your presence, Mr. Lampley, do you have an opinion—and this question can be answered yes or no—do you have an opinion as to whether or not there is any prejudice in the community against the defendant Winston Churchill Henry?

Mr. Hoddick: I object—and please don't answer. There is nothing that the witness has said which indicates the existence of a prejudice in the minds of the people with whom he spoke. All of the conversations which he has recounted [35] refer to what the people thought what I suppose the law enforcement officers would do in due course, but there was no indication that those statements that they had expressed was an opinion as to whether they themselves were prejudiced or as to whether there was a prejudice in the community.

Mr. Landau: On the theory that I might not have proven that sufficiently, I will go further into that matter.

Q. What other conversations have you overheard or people had with you with reference to this defendant?

(Testimony of Thomas Lampley.)

A. Well, I have heard them say, "Well, a character like that is no place in the Territory for him; they should just get rid of him; if I was the judge or jury I would just get rid of him, that's just what I would do." I heard people say it to me.

Q. Has that been on a few or many occasions?

A. Many occasions, because in my getting around I guess he comes up in the conversation about as much as boxing does in most places I go.

Q. Well, have there been any other statements made in your presence, Mr. Lampley?

A. It is mostly statements; all run just about the same; people's opinion about what they would do if they was to pass judgment on him; most all run the same, about getting rid of him or send him up, things like that.

Q. Now, based on the statements which you have heard, [36] and the conversations which you have had, do you have an opinion—this is yes or no, Mr. Lampley—do you have an opinion as to whether or not there exists in this community prejudice against the defendant, Winston Churchill Henry?

A. I'd say yes.

Q. You have an opinion? A. Yes.

Q. Will you tell the Court what your opinion is? Is there or is there not prejudice in the community against the defendant?

Mr. Hoddick: Objection, your Honor, on the grounds that there is not a sufficient foundation for this man to show that he has knowledge as to

(Testimony of Thomas Lampley.)

whether prejudice exists in the community or not. He may have inferred from his conversations with these people as to whether they themselves as individuals are prejudiced, but I do not think it has been shown that that is representative of the community as a whole.

The Court: Overruled.

Q. Will you tell us what your opinion is, Mr. Lampley?

A. Well, my opinion is that I'd say there is prejudice because most everyone is just like if they read anything in the paper about somebody else doing something, well, they never discuss it, but if it's Winston Churchill Henry they always come up and start discussing it with me, and they always make, have their minds made up right away what they [37] would do with him. But if somebody else does something or anything like that, they never discuss it or say anything about it. It's only him. That's why I say there is prejudice because they only discuss what he does.

Mr. Landau: Your witness.

Cross-Examination

By Mr. Hoddick:

Q. Now, Mr. Lampley, you said you were down in Hilo in July? A. Yes, sir.

Q. Can you give me the name of one person who has suggested to you that a character like that has no place in Hawaii and you should get rid of him?

(Testimony of Thomas Lampley.)

A. The name of one person?

Q. You said there were many of them. I'd like to have the name of just one.

A. One fellow I know by the name of Toy. All I know is "Toy." I don't know how to spell it.

Q. What is he, Chinese?

A. He is Oriental. I don't know what.

Q. And where do you know him. Where does he live?

A. Well, I just see him around bars. You know, I was living at a hotel down there, and, as I stated before, I goes to different bars and places in Honolulu and a lot of people know me, that I don't know them, by me handling fighters. [38]

Q. What bar did you see Mr. Toy in?

A. It was the Hilo bar.

Q. The Hilo bar? A. Hilo bar.

Q. That's here in Honolulu?

A. No, that's in Hilo.

Q. And you have seen him there very many times? A. Quite often.

Q. Do you know his first name?

A. I told you, Toy; everybody calls him Toy. That's all I know.

The Court: Toy or Choy?

The Witness: Well, it's Toy.

The Court: Toy?

The Witness: See, I was only down here about three months and naturally I only met one other colored boy when I was down there. Well, people

(Testimony of Thomas Lampley.)

in a small town, they read the paper and see me in the bar; they just come up to me and start talking, just many of them. And as soon as they see the paper they come up and they would approach me and asked me, "Do you know this Winston Churchill Henry?" And I tell them, "Yes, I know him." Sometimes I'd say, "No." But they all, I know they were saying it first because he was negro and they knew I was negro and they'd come up and start talking to me about it. [39]

Q. Was that in the early part of July or the last part of July?

A. Oh, I was in Hilo from June until September. Just what date in July, I couldn't tell you specifically what date.

Q. Mr. Toy is the only one by name who has discussed this matter with you? The only one you know by name? A. Yes.

Q. You have other friends in the community who are also negroes?

A. No, there was only one in Hilo. I only met one other negro in Hilo besides myself.

Q. Well, you are up here in Honolulu now.

A. Oh, in Honolulu, sure.

Q. And you testified that people up here had told you the same thing, didn't you?

A. Yes, but it was no negro person, just people in general.

Q. I understand that. But you have friends here in Honolulu who are negroes, do you not?

(Testimony of Thomas Lampley.)

A. Yes.

Q. And have you ever discussed Winston Churchill Henry with them? A. I have.

Q. And from your conversations with them, would you [40] give your opinion as to whether those people were prejudiced against the defendant or not? A. You mean negro friends?

Q. Your negro friends in Honolulu.

A. Well, in discussing things like that, some of them make a statement like, "I don't think they are going to be fair with him because I never got a fair chance like that." And those people come in contact with people the same like I do.

Q. What these people had to say to you, your negro friends here in Honolulu, is to what they thought the authorities would do to Henry, was it not? It wasn't a question of what they would do if they were in a position to do something?

A. No, they never said anything like that to me.

Q. As a fight manager you met lots of people, didn't you? A. I do.

Q. Lots of new people each week?

A. Yes, lots of people. Every time there's a fight I meet people, people generally come up and start talking to me. I never know their names. I may see them as people that I have been seeing in fights for the last five years around here, and if they walk into the door I couldn't tell you their names. Any other fight manager connected with sports like that would do the same thing. He couldn't tell you their names.

(Testimony of Thomas Lampley.)

Q. I know this would be difficult to do, Mr. Lampley, but of all the people with whom you have conversed during the last six months, could you give us an estimate as to how large a percentage of them have discussed the defendant, Winston Churchill Henry, with you?

A. How large a percentage of the people that I have met?

Q. The people you met and the people you know, the people you see every day.

A. It's just like you say; it's pretty difficult to do, a thing like that.

Q. Have all of them discussed Henry with you?

A. No, not all.

Q. Half of them discussed Henry with you?

A. At some time or other I'd say just about everybody in sports that I have talked to for any length of time they would say something about him.

Q. And has everybody in sports with whom you have talked to from time to time said something prejudicial about Henry?

A. Not all. But the only ones that did speak that they felt a prejudice towards him, they felt as though that the others were prejudiced towards him, because they spoke [42] that way to me. They said he won't get a chance. And these were not negro people.

Q. But there was no indication that the people you spoke with were prejudiced?

A. Oh, yes, because why I say that the majority

(Testimony of Thomas Lampley.)

is prejudiced is just like, as I said before, there's many cases that you read in the paper of different people doing different things, but there isn't any so widely discussed as him. Especially they will always come to me because he's negro and I'm negro. If somebody else goes out to rob or kill somebody, they don't come up and say anything to me about it, these same people that I meet every day. But if it's him, they come up to me because he's negro and I'm negro. And they want to discuss or find something about him. And I have had people come around and say, "Show me Henry"; come right downtown and say to me, "Show me this Henry, I want to see him, I read so much about him that I want to see him." And I don't know their name. And I say, "Well, I don't know him." "I want to see this guy."

Mr. Hoddick: No further questions.

Redirect Examination

By Mr. Landau:

Q. You say, Mr. Lampley, that some people who have spoken to you and did not indicate prejudice against Henry, did indicate that Henry would not get a fair chance? [43]

A. Yes, they said that.

Mr. Landau: That's all. Step down. Thank you.

(Witness excused.)

RICHARD R. WILLIAMS

a witness in behalf of the Defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Landau:

Q. What is your name, please?

A. Richard R. Williams.

Q. And what is your occupation?

A. Police reporter for the Star-Bulletin.

Q. And how long have you been police reporter, Mr. Williams?

A. Two years.

Q. Now, Mr. Williams, you have been subpoenaed to appear here as a witness in this case?

A. That's right.

Q. Now, as police reporter it is your duty to write about the activities and doings in the police court, in the magistrate's court in Honolulu?

A. That's right.

Q. Now, Mr. Williams, on or about the 21st day of September did you cause to be written in the newspaper, the Star-Bulletin, a certain item entitled "Long List of Arrests [44] Shows on Record of Winston Churchill Henry?"

A. I did.

Q. Now, prior to the time that that article appeared in the newspaper, was there a rough—I don't know what you would call it—a rough copy of this item printed for later publication?

A. No, there was not.

Q. Was there an article showing his list of arrests written up for subsequent publication?

(Testimony of Richard R. Williams.)

A. There was an article which contained his list of arrests.

Q. I see. It wasn't this particular one?

A. It was not that particular one.

Q. But there was such a list?

A. That's right.

Q. And if you remember, Mr. Williams, that item was prepared prior to the publication of the one that appears in this paper of September 21st, isn't that correct?

A. I don't recall whether it was before or after.

Q. I see. Do you recall that that particular item was left with the members of the District Court to comment on? A. It was.

Q. And do you recall whether or not I also looked at that document?

A. I was told that you did. [45]

Q. And do you recall that I told you that that should not be published? A. You did.

Q. And I asked you to see that it wasn't published? A. No.

Q. I asked you.

A. I don't believe that is correct.

Q. I will strike that. You said that that was a matter which your editor had requested you to write up? A. That's correct.

Q. And that the matter would be entirely up to him? A. That's correct.

Q. And the editor, of course, is Mr. Allen of the Star-Bulletin? A. That's correct.

(Testimony of Richard R. Williams.)

Q. At the time that I suggested to you that such an article should not be published, you knew that I was representing Mr. Henry?

A. That's correct, I did.

Q. And the case in this Court and on other matters?

A. That's right.

Q. Despite my suggestion to you that such an article be not written and published, your editor did in fact publish it?

A. Apparently he did. [46]

Mr. Landau: I offer this in evidence, if the Court pleases.

Mr. Hoddick: No objection.

The Court: It may become——

The Clerk: Defendant's Exhibit No. 1.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 1.)

DEFENDANT'S EXHIBIT No. 1

Honolulu Star-Bulletin,

Wednesday, September 21, 1949

Long List of Arrests Shows

On Record of Winston C. Henry

Behind the indictment last Thursday of Winston Churchill Henry is a long list of arrests and other items for the "police blotter."

Henry's latest tangle with the law is only one of many that extend from the Pacific coast to Hawaii.

(Testimony of Richard R. Williams.)

He is known to the police as "Frisco Shorty"—a nickname used on several occasions.

He is now charged and indicted by the federal grand jury, on charges of illegal possession of narcotics and selling liquor without a license.

* * *

The indictment on the narcotics charge came after he was arrested on July 16. Henry, along with Mrs. Helen Thomas, 28, was arrested at 803 Hausten St., following a joint federal-Honolulu police raid.

Mrs. Thomas was freed by U. S. Commissioner Harry Steiner. He said there was insufficient evidence to substantiate the charges.

Raiders Made Fat Haul

In that raid more than \$50,000 in narcotics was seized by the raiders. Included in the narcotics was marijuana, cocaine, and heroin. A sub-machine gun, a pistol and an army rifle were also seized.

The firearms case is still pending in district court.

On August 7 Henry was charged with operating as a liquor dealer without a federal tax stamp, permitting gambling in his home and being in a barricaded place. The indictment on the liquor charges came after this raid.

The charges followed another joint federal-Honolulu police raid at 408 Keoniana St. Seventeen others were arrested at the same time. They were charged with gambling and being in a barricaded place.

Henry's Partner Skips Out

Following that raid Henry's gambling lieutenant,

(Testimony of Richard R. Williams.)

Charles W. Montgomery, 46, was fined \$125 in district court on August 18. He left town that night by plane. "This town is too hot for me," he told a Star-Bulletin reporter.

Montgomery also was arrested following the Husten St. raid but was not charged. The case against the 17 others from the Keoniana St. raid is also still pending.

Here's Henry's Record

Henry's police record extends from Alaska to Hawaii.

Following is his Hawaii record:

August 25, 1947—Arrested for soliciting. He pleaded not guilty and was committed to circuit court where the case was thrown out for lack of evidence.

January 3, 1948—Charged with profanity and given a 13 months suspended sentence which he appealed. On the appeal he was fined \$10 in the first circuit court.

May 3, 1948—Charged with loitering and committed to circuit court, where he demanded a jury trial and pleaded not guilty. The case was thrown out in the first circuit court.

July 17, 1948—Arrested for spitting on the sidewalk. He forfeited a \$10 bail.

* * *

August 28, 1948—Charged with assault and battery on a police officer. He pleaded not guilty, demanded a jury trial and was committed to circuit court. He was found guilty and sentenced to 60

(Testimony of Richard R. Williams.)

days in jail, suspended for 13 months and fined \$200.

August 28, 1948—Charged with possessing unregistered firearm. Pleaded not guilty, demanded jury trial and committed to circuit court. The case was remanded to district court where it is still pending.

On the same date he was charged with illegally acquiring a firearm. That case too, is still pending in district court.

July 16, 1949—Possession of a machine gun and violation of firearms regulations. Still pending in district court.

July 21, 1949—Charged with being in a barricaded place and permitting gambling in his home. Still pending in district court.

Record on Mainland

Following is Henry's mainland record—at least, what police and federal authorities know of it:

August 1, 1934—Charged with petty theft in El Centro, Calif. He was sentenced to 50 days in jail.

* * *

March 31, 1939—Charged with a traffic violation in El Centro and fined \$50.

September 13, 1945—Charged with disorderly conduct in Juneau, Alaska, and fined \$100.

Several other arrests for various offenses committed on the mainland are on record here.

Dispositions of these cases have not been received.

Admitted Nov. 9, 1949.

(Testimony of Richard R. Williams.)

Mr. Landau: I will comment on those as we go along, if the Court pleases.

Q. Now, Mr. Williams, I show you this item which somebody tore out for me but didn't give me the whole sheet, and ask you whether you were responsible for that? A. I am.

Q. And in that item you say that Mr. Henry is one of Honolulu's better-known underworld characters? A. That's correct.

Mr. Landau: I offer this in evidence, if the Court pleases.

Mr. Hoddick: No objection.

The Court: It may become——

The Clerk: Defendant's Exhibit No. 2.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 2.)

DEFENDANT'S EXHIBIT No. 2

Nine

Frisco Shorty Trial

Set for November 22

Winston Churchill Henry is scheduled to appear in district court November 22 for arraignment, plea and trial on charges of illegal possession of an army automatic rifle.

* * *

Friday, Henry, also known as "Frisco Shorty," was acquitted of a charge of illegal ownership of the rifle. As he left the police station Sgt. Hong

(Testimony of Richard R. Williams.)

Sing Chang met Henry with a warrant on the illegal possession charge.

One of Honolulu's better known underworld characters, Henry is to appear in district court Wednesday again on charges of being in a barricaded place.

Admitted Nov. 9, 1949.

Mr. Hoddick: I might ask Counsel, do you know the date?

Mr. Landau: I'm afraid I don't Counsel. But it says [47] that the case will be set for November 22nd. So we must assume that it was before November 22nd.

Mr. Hoddick: You represented, you are going to represent him beyond, you represented beyond that in that case. Do you know as to your own knowledge when that setting was or how long ago?

Mr. Landau: I will tell you. I believe it was around October 19th.

Mr. Hoddick: I'm willing to stipulate that it was October 19th for the purposes of identifying this article.

Mr. Landau: O.K.

The Court: Very well.

Q. Showing you the Honolulu Star-Bulletin for Thursday, July 21, 1949, I ask you whether this item that was written by you, whether this item was written by you? A. I'm not——

Q. You did not write it? A. I did not.

(Testimony of Richard R. Williams.)

Q. Did you see it in the newspaper?

A. I did.

Q. Do you know who wrote it?

A. I'm not sure.

Q. But this is your newspaper and you did see it at the time?

A. That's correct. [48]

Q. And in this item Mr. Henry, the defendant, the defendant in this case, is stated to be the boss of Little Harlem?

Mr. Landau: I offer this in evidence, if the Court pleases.

Mr. Hoddick: What is the date of that?

Mr. Landau: July 21, 1949.

The Court: It may become——

The Clerk: Defendant's Exhibit No. 3.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 3.)

DEFENDANT'S EXHIBIT No. 3

Honolulu Star-Bulletin,

Thursday, July 21, 1949

Little Harlem's Boss Arrested

Winston Churchill Henry, "The boss of Little Harlem," was arrested for the second time in less than a week during a raid on a house at Keoniana St. and Kalakaua Ave. in Waikiki at 1:30 this morning.

Henry and 16 other men were taken to police

(Testimony of Richard R. Williams.)

headquarters after raiding officers unexpectedly interrupted a dice game.

Henry was charged with permitting gambling at his home and released about 3:30 on \$250 bail. At the time of arrest he was free on \$1,100 bond on charges of illegal possession of narcotics.

The other 16 men were charged with being present at a gambling game. Bail for each was set at \$100.

Admitted Nov. 9, 1949.

Q. Showing you the Honolulu Star-Buletin for Tuesday, September 27, 1949, I ask you whether you wrote this article entitled "Acting Police Chief Scores Henry Case?" A. I did.

Q. And did you get the statement from the Chief of Police which you have ascribed to him in this document?

A. I got it from the Acting Chief of Police, Farr.

Mr. Landau: I offer it in evidence, if the Court please.

The Court: It may become——

The Clerk: Defendant's Exhibit No. 4.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 4.)

(Testimony of Richard R. Williams.)

DEFENDANT'S EXHIBIT No. 4

Honolulu Star-Bulletin,
Tuesday, September 27, 1949

Acting Police Chief Scores Henry Case

Acting Police Chief George M. Farr said this morning that he conferred with Public Prosecutor Charles M. Hite in reference to the nolle prossed case Monday of Winston Churchill Henry and 17 others.

Chief Farr said they discussed the case and Mr. Hite is to give the chief instructions on how to follow up on the case.

* * *

"I'm quite concerned," the chief said, "because I don't feel the court was fair in not granting the continuance. The defendant has been granted several continuances.

* * *

"Also I can't understand why the prosecutor could not carry on the case with what witnesses he had. He had the man who served the search warrant and the man who led the raid."

Star Witness Sick

Judge Leslie P. Scott Monday denied a request by the prosecution to continue the case. Officer Frank Anderson, whom the prosecution termed its "star witness," was sick and could not appear in court.

(Testimony of Richard R. Williams.)

The defendants were arrested in May following a joint Honolulu police-federal raid at 408 Keoni-ana St. in Waikiki. They were charged with gambling and being in a barricaded place.

* * *

U. S. Narcotics Agent William K. Wells led the raid with Lt. Hugh Whitford, then captain of the vice squad. Wells served the search warrant on Henry.

Lt. Whitford and several other officers of the raiding party were standing outside the courtroom Monday but were not called in. Mr. Wells says he was not subpoenaed.

May Reopen Case

Chief Farr says there is a good possibility the case will be reopened. He said Mr. Hite was to confer with his assistants this afternoon.

* * *

Assistant Public Prosecutor Noboru Nakagawa says no attempt was made to try the case Monday. "We were told that it was Officer Anderson who would be the most capable witness since he was the first one in the house," Mr. Nakagawa said.

* * *

"But the case isn't out the window," he said. "The case can be reopened at any time and there's a good possibility it will be," he said.

(Testimony of Richard R. Williams.)

Winston C. Henry's Attorney Asks
Bill of Particulars

A detailed statement by the government of facts involved in connection with federal charges against Winston Churchill Henry, 35, 408 Keoniana St., was requested today.

To obtain this, Samuel Landau, defense attorney, filed a motion for a bill of particulars before Federal Judge Delbert E. Metzger. Argument on the motion is to be heard Wednesday morning.

* * *

Henry is charged in two indictments with violation of federal narcotics and liquor laws.

* * *

A similar motion was filed on behalf of Kershaw Weston, same address. He is charged with federal liquor law violation.

Admitted Nov 9, 1949.

Q. Showing you the Honolulu Star-Bulletin for Thursday, October 6, 1949, Mr. Williams, did you write this article that appears under the heading, Judge Rejects Circumstantial Evidence—So—Winston Churchill Henry Again 'Beats Rap'; Two Cases Pending''? A. Yes.

The Court: When you say you write an article, does that include the headline?

The Witness: No, it does not.

Mr. Landau: I see.

(Testimony of Richard R. Williams.)

The Court: What is the date of that?

Mr. Landau: October 6, 1949. May I offer this in evidence?

The Court: Yes.

The Clerk: Defendant's Exhibit 5.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 5.)

DEFENDANT'S EXHIBIT No. 5

Honolulu Star-Bulletin,
Thursday, October 6, 1949

Judge Rejects Circumstantial Evidence—So—

Winston Churchill Henry Again
'Beats Rap'; Two Cases Pending

Winston Churchill Henry has "beaten the rap" again.

He and 11 others were found not guilty of gambling in a decision handed down Wednesday morning by Judge Clifton H. Tracy.

The 35 year old man—dubbed "Frisco Shorty" by police—has been arrested eight times in Hawaii on charges ranging from spitting on the sidewalk to illegally possessing firearms and narcotics.

His only major conviction is on a charge of assaulting a police officer. He was fined \$200 and given a 60 day suspended jail sentence.

The acquitted men were arrested at about 1:30

(Testimony of Richard R. Williams.)

in the morning of July 21 after a raid on Henry's house at 408 Keoniana St. in Waikiki.

Federal agents and members of the Honolulu police department's vice squad scaled the walls around Henry's place in what was intended to be a surprise raid.

But a woman on the lanai saw the raiders and screamed. By the time police reached the main room of the house, its occupants were dispersing from what police asserted was a gaming table.

Police Officer Hiram Tasaka was first to reach the room. He made a dive for the table and came up with a layout cloth, a pair of dice and a nickel.

But nobody saw any gambling.

Evidence Circumstantial

The prosecution admitted throughout its case that all its evidence was circumstantial.

Judge Tracy found Henry and the rest not guilty because, he said, the prosecution had not established guilt.

* * *

"All the evidence introduced by the government was circumstantial," he told a Star-Bulletin reporter after the trial ended.

* * *

"Circumstantial evidence is not enough in a gambling game. It does not prove the defendants were gambling."

Noboru Nakagawa prosecuted the case for the city-county. Opposing him were Attorneys Samuel

(Testimony of Richard R. Williams.)

Landau, O. P. Soares and William Z. Fairbanks.

Hite's Comment

The Star-Bulletin consulted Public Prosecutor Charles M. Hite Wednesday afternoon—not for an opinion of the case but for his ideas on circumstantial evidence in general.

“Circumstantial evidence is used daily in all kinds of cases and in all kinds of courts to establish the guilt of a defendant,” Mr. Hite explained.

“It is used daily in felony cases. It is used daily in misdemeanors. Often it is stronger than direct evidence.”

Other Cases Pending.

But Henry has jumped only one of the legal hurdles in his path. He and 11 others still have a case pending in district court. Under the charges they are accused of being in a barricaded place.

And in the district court, he faces charges of illegally possessing narcotics. Hearing on a motion for a bill of particulars in that case has been set for 10 Friday morning.

Admitted Nov. 9, 1949.

Q. Who wrote the headline for these articles, Mr. Williams?

A. A person known as the desk man.

Q. I see. Now, both you and the desk man are under the control of the editor of the newspaper?

A. That's correct.

(Testimony of Richard R. Williams.)

Q. And, as a matter of fact, do you know whether or not Mr. Allen rather carefully scrutinizes in the newspaper the statements that are in there?

The Court: Before or after printing? [50]

Mr. Landau: Well, before printing.

A. Well, before they appear for publication, that's true, he does.

Q. Well, now, Mr. Williams, when you published these items, especially the one of September 21st, which was Exhibit No. 1, which had the long list of arrests, you were carrying out orders of your editor, is that correct?

A. No. I believe that I got myself—I went into the Records Bureau of the Police Department and got a list of records of his offenses, wrote the story, and then submitted them to Mr. Allen for approval. And that was the last I saw of the story until it appeared in the paper.

Q. As a matter of fact, didn't Mr. Allen ask you to get that information?

A. No, I don't believe he did.

Q. Let me see if we can—my memory may be poor, but I want to be straightened out on this if I'm wrong. Didn't you and I have a conversation about that and didn't I tell you that in my opinion a statement like that had no newsworthy interest at the moment, and that you replied that I'd have to see Mr. Allen because he's the one that had told you to write it up?

(Testimony of Richard R. Williams.)

A. That's right. It was submitted to him for approval.

Q. But hadn't he asked you to write it up and get the information and write up an article? [51]

Mr. Hoddick: May it please the Court, I will object to the question. First of all, I think that Counsel is cross-examining his own witness, and second of all, I think it is entirely immaterial as to whether Mr. Churchill's arrests in the community were well-advertised or not. It seems to me that whether this publicity stirred up prejudice and resentment against Henry in the community has nothing to do with how it happened to appear in the paper or who approved its going into the paper, or even who wrote it.

Mr. Landau: I want to show, if the Court pleases, that there has been so much of this in the newspaper, with the appellation given to the defendant "Boss of Little Harlem" and "Underworld Character," and so forth, that it has automatically affected the community. And I think it is also important to ascertain just who it was that is responsible for the writing of these articles, whether or not they were passed and approved by the city editor, by the editor, I should say; and to determine whether or not or who in this particular instance of the long list of arrests wanted that article written; to determine its effect on the community; and maybe who is responsible. I don't know.

The Court: Well, interesting though it may be,

(Testimony of Richard R. Williams.)

the other side of it is the important side. Related to your motion, regardless of how it got in the paper, the important thing to you is that it was in the paper and no doubt read [52] by the Star-Bulletin's how many subscribers?

The Witness: 84,000.

The Court: 84,000 subscribers.

Mr. Landau: I think that is all, if the Court pleases.

The Court: Cross-examination?

Mr. Hoddick: No cross-examination.

The Court: You are excused.

(Witness excused.)

JACK M. FOX

a witness in behalf of the Defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Landau:

Q. What is your name, please?

A. Jack M. Fox.

Q. And what is your occupation?

A. I am a news reporter.

Q. With what newspaper?

A. Honolulu Advertiser.

Q. And what particular beat do you cover, Mr. Fox?

A. Police District Court, fire.

The Court: Fire?

(Testimony of Jack M. Fox.)

The Witness: Fires that occur in the city.

Q. Part of your duties is to report upon the activities in the Magistrate's Court in Honolulu?

A. That's right. [53]

The Court: Mr. Landau, may I suggest that, similar to Mr. Williams' testimony, if there is something that you want to bring out, something particular, couldn't it be stipulated that these things were published?

Mr. Hoddick: I will stipulate that they were published and consent to their introduction in evidence.

Mr. Landau: All right. Then I think that's all.

Mr. Hoddick: I'd like to have the dates.

The Court: Well, proceed to put them in evidence directly. Exhibit 6 will be——

Mr. Landau: I have, if the Court pleases, a copy of an editorial in the Honolulu Advertiser for August 10, 1949. I was unable to get the paper itself but I made a copy of it this noon at the Advertiser office. If Counsel will kindly permit me to read it in the record—the Court cannot read my handwriting or else I would put it in. This is an editorial comment and I will read it.

The Court: Well, better than that, supposing you have it typed up and supply it.

Mr. Landau: Very well.

The Court: So, subject to check——

The Clerk: Do you want to give it a number now?

(Testimony of Jack M. Fox.)

The Court: We will give it a number, Defendant's Exhibit 6.

(The newspaper item referred to was received in evidence [54] as Defendant's Exhibit No. 6.)

DEFENDANT'S EXHIBIT No. 6

August 10, 1949—The Honolulu Advertiser

Ubiquitous Mr. Henry

Mr. Winston Churchill Henry has been entirely too much in Honolulu's police news during the past two years. He has been arrested on eight occasions, charged with seventeen violations of the law. Each time he has quickly been released on bond, many times being re-arrested under conditions that seemed like a resumption of the offenses charged before previous accusations against him have been disposed of by the courts.

He has paid one fine of \$10.00, delayed another of \$200.00 by a notice of appeal. He has been sentenced to two terms of sixty days in jail, with subsequent suspended sentences of thirteen months, and regained his liberty on bond by notice of appeal.

His first arrest here—his record shows seventeen prior arrests on the mainland—was two years ago, August 25, 1947, on a charge of "soliciting." Five months later the case against him was dropped by a "nolle prosequi," unwillingness to prosecute.

(Testimony of Jack M. Fox.)

Police records indicate evidence that marked money given to him was found shortly thereafter in a woman's possession.

Since then he was found guilty of assaulting policemen, was the central figure in five raids on barricaded premises at Waikiki and on a woman's abode on Hausten Street. Narcotics, gambling devices, illicit firearms, women were found by the raiders. Each time Henry was freed on bond. He is at liberty now after arrest early Sunday morning.

This man stands convicted of assaulting policemen. He is found repeatedly in situations that require his arrest. Yet he manages to stay in circulation. To the layman it appears that his innocence or guilt should be established within the shortest possible time, and that in the meantime some way might be found whereby the police can account for all his actions at all times.

Whatever the technicalities of the law may be, Winston Churchill Henry has shown without question that he contributes nothing to the social and moral welfare of Honolulu.

Admitted Nov. 9, 1949.

Mr. Landau: I have here a page from the Honolulu Advertiser, September 28, 1949, an editorial entitled "Mr. Henry Is Out Again."

The Court: Exhibit 7.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 7.)

(Testimony of Jack M. Fox.)

DEFENDANT'S EXHIBIT No. 7

The Honolulu Advertiser

[Masthead.]

Wednesday, September 28, 1949

Mr. Henry Is Out Again

Once more Mr. Winston Churchill Henry has beat the rap. Once more the City and County Prosecutor's office has refused to proceed against this man, arrested eight times on charges of seventeen violations of the law, when time came for his trial. The people of Honolulu are not likely to find even the slightest satisfaction in the statement of the prosecution that illness of its chief witness, Police Officer Frank Anderson, excused its inaction. Mr. Anderson reported for work on the afternoon of the day the trial was to be held.

Whether Police Officer Anderson was available or not, the prosecution has thus far given no reason why the trial should not have gone forward. Several officers, including a Federal narcotics agent, were present when Henry was arrested nearly five months ago on a charge of being in a barricaded place. For some reason, best known to Prosecutor Hite's office, only two of them were subpoenaed as witnesses. Others were available, even at this late date, if the prosecutor had seen fit to call them.

Five months is a long time for a trial in police court to be delayed. It would seem that so long a wait would tend to obscure evidence rather than strengthen it. But the records indicate that long

(Testimony of Jack M. Fox.)

waits are customary in cases involving Mr. Henry, who has been charged with various offenses involving narcotics, women, illicit firearms and an assault upon a policeman, yet has managed to remain at liberty on bond.

The public is entitled to more definite action in the matter of Mr. Winston Churchill Henry. It looks to Public Prosecutor Hite for that action. The situation is of too great community concern to be left to underlings.

Admitted Nov. 9, 1949.

Mr. Landau: I have here the Honolulu Advertiser of Sunday, October 16, 1949, in Letters to the Editor, rather letters from the people to the editor, entitled, "Who Is Behind Henry?"

The Court: Exhibit 8.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 8.)

DEFENDANT'S EXHIBIT No. 8

The Honolulu Advertiser
Sunday, October 16, 1949

Who Is Behind Henry?

Editor The Advertiser:

On the front page of The Advertiser this morning we read of the arrest of a twenty-six-year-old taxi

(Testimony of Jack M. Fox.)

driver for selling two marijuana cigarettes. The vice squad chief announces that this is the opening of a drive against taxi drivers suspected of selling narcotics. I am wondering if Neal Donohue thinks that it is worth while arresting a man for selling only two marijuana cigarettes. Surely he must realize that he is wasting his time since one Winston Churchill Henry has been arrested several times this year. He has been in a barricaded place along with his guests or clients, liquor served from a well stocked bar has been found, evidences of gambling and not only two little marijuana cigarettes have been found in Henry's house but large quantities of drugs, some of them buried in the garden.

This man Henry does not belong here but is from the Mainland and still at large.

Perhaps this taxi driver will receive the same lenient treatment and I shall be extremely interested to see whether this is the case or not.

Once more I ask who and what is behind Henry?
Oct. 11.

PETER P. SHAW.

Admitted Nov. 9, 1949.

Mr. Landau: The newspaper for Tuesday, November 8, 1949, if the Court pleases——

The Court: What was the date?

Mr. Landau: November 8, 1949, entitled "Henry Gets Off Again For \$25."

(Testimony of Jack M. Fox.)

The Court: Nothing in the paper today?

Mr. Landau: I haven't seen today's paper, Judge. I'd like to call the Court's attention to this article which has a nice big black headline.

The Court: I broke my glasses yesterday. I didn't read the paper last night, which is the truth.

Mr. Landau: Plainly enough, if the Court pleases, I think the witness, Mr. Fox, I don't know whether he will agree with me or not—oh, well, it doesn't matter—withdraw that.

The Court: That last exhibit becomes No. 9.

(The newspaper item referred to was received in evidence as Defendant's Exhibit No. 9.)

DEFENDANT'S EXHIBIT No. 9

The Honolulu Advertiser
Tuesday, November 8, 1949

Henry Gets Off
Again For \$25!

Winston Churchill Henry, 35-year-old Negro, and 22 others pleaded *nolo contendere* to charges of being in a barricaded place, were found guilty, and each was fined \$25 Monday by District Judge Mil-lard D. White.

The case, concerning a raid on the Henry residence at 408 Keoniana St., May 8, originally came before the court on Sept. 27.

At that time the government *nolle prossed* the

(Testimony of Jack M. Fox.)

charge saying that the star prosecution witness was absent.

* * *

Those who paid fines, in addittion to Henry, were Helen Thomas, 29, 408 Keoniana St.; Irma Talley, 26, 805 Kinau St.; Lillian Evans, 27, 2562 Date St.; Thomas Sanders, 1508B Emma St.; Harold Reed, 36, 2239 N. School St.; Charles L. Nelson, 36, 2239 N. School St.; Oliver M. Lonon, 26, 1508 Emma St.

Roy H. Saunders, 55, Leonard Hotel; Walter B. Mays, 36, Damon Tract; Gerald F. Warner, 36, 2019 Puowaina drive; Claude Williams, 27, Damon Tract; Kenneth Valley, 1736-D Kalakaua Ave.; Orestes Cavness, 25, 1170 Smith St.; Alvin G. Garrett, 35, 2562 Date St.; Jerry Jones, 26, 80 S. Beretania St.; Marian Morichika, 32, 1546 Magazine St.

* * *

Rhemus Fales, 32, 411 Hobron Ln.; Kershaw Weston, 27, 411 Hobron lane; Richard Harris, 27, 130 Kealohilani Ave.; Andrew Warner, 37, 2019 Puowaina drive; Audrey Cole, 28, 2019 Puowaina drive; Eugene Wallace, 30, 3237 Nimitz highway; Gazella Mitchell, 26, 2239 N. School St.

Admitted Nov. 9, 1949.

The Court: Well, I have got to adjourn for the day at this time. I planned to go forward with

your Woolley case tomorrow afternoon, but I guess we had better finish this up. I hear tell you are going somewhere soon, Mr. Hoddick.

Mr. Hoddick: I am, your Honor. The only thing that I have in mind is that I have three witnesses that I asked to come in. I don't think it would take more than five minutes to take the testimony of all three of them, if we can put it in.

The Court: I'm sorry but they will have to come back tomorrow at two.

Mr. Landau: Your Honor has a case in the morning?

The Court: Yes.

Mr. Landau: Two o'clock?

Mr. Hoddick: Your Honor, I have an engagement over in the Circuit Court before Judge Towse on a tax matter in which the United States is involved, at two o'clock. How much longer will you take, Mr. Landau? [56]

Mr. Landau: I have one more witness.

Mr. Hoddick: I will arrange for somebody else to go over there.

The Court: All right. Two o'clock.

(The Court adjourned at 3:55 p.m.) [57]

November 10, 1949

The Clerk: Criminal No. 10,253, United States of America vs. Winston Churchill Henry, and Criminal No. 10,254, United States of America vs. Winston Churchill Henry and Kershaw Weston, for further

hearing on motion to transfer case from the District of Hawaii.

Mr. Landau: At this time, if the Court please, I would like to introduce in evidence typewritten copy of the editorial which appeared in the Honolulu Advertiser August 10, 1949.

The Court: We saved space for that, as Exhibit 6.

Mr. Landau: That's right.

The Court: Subject to check—or has it been checked

Mr. Landau: It has not been checked.

The Court: Subject to check, it may be received.

(Thereupon, the document above referred to was received in evidence as Exhibit 6.)

Mr. Landau: Actually, Counsel will have to go over to the Advertiser to check it. He will just have to take my word.

Mr. Hoddick: I assume that it is a correct copy.

The Court: Next witness.

ARTHUR MCGRAW

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

Direct Examination

By Mr. Landau:

Q. What is your name?

A. Arthur McGraw.

Q. Where do you reside, Mr. McGraw?

(Testimony of Arthur McGraw.)

A. Kaneohe Tract on the other side of the Island.

Q. And how long have you been a resident of the city and county of Honolulu?

A. Four and a half years.

Q. What is your business?

A. I am a property owner and property manager.

Q. Mr. McGraw: You were here in Court yesterday as a spectator? A. Yes, sir.

Q. And at the close of the hearing did you come to me and volunteer some information?

A. Yes, sir.

Q. As a result of that information I have asked you to appear again today? A. Yes, sir.

Q. You do know Mr. Henry, the defendant in this case, don't you? [59] A. Yes, I do.

Q. Now, Mr. McGraw, in the last two or three months have you heard remarks being made, or been in conversation with people, concerning these cases? A. Yes, sir.

Q. Will you tell the Court, to the best of your recollection the conversations that were had and the statements that were made that you heard concerning these cases?

Mr. Hoddick: We object, your Honor, on the grounds that anything the witness says will be hearsay and the Government will be deprived of the opportunity to cross-examine people who made the statements.

The Court: It is probably true. I am going to overrule the objection, however, to be consistent.

(Testimony of Arthur McGraw.)

Q. (By Mr. Landau): Do you remember the question?

A. I have talked to a great many people, probably in most walks of life, and it just struck me as peculiar that there is no other white man who would come up here and testify that they were not prejudiced. I have a feeling I know a little bit about human relations; most people think with their hearts instead of their head. I feel that if I was on a jury——

Q. That isn't the question, Mr. McGraw. Have you heard statements that were made in your presence?

A. Yes, I have. [60]

Q. What were those statements and remarks that were made?

A. I will start this morning. In fact, here is a card of the man I talked to. I was curious. This man is a salesman and he wanted to sell me something today. I told him I had to go to court, I was going to a very interesting case. He asked me which one it was, and I informed him it was this case, Winston Churchill Henry case. And he said "Oh, that is the fellow that sells marihuana cigarettes." I think that is prejudice right there. So I got a little curious, and I asked him some more questions, and I definitely asked the man, would he be prejudiced, and he said, "Well, I think I would, like most other people."

I said, "Well, what type of people do you think would make up a fair jury?"

(Testimony of Arthur McGraw.)

He says, "Well, you would probably have to find people like himself to be fair, give him a fair trial." In fact, the only—if I try to recall what he said. He said, "The only fair trial would be his own kind, that would be only fair to him," referring to Mr. Churchill, or Mr. Henry.

And the other party—do you want the names of these people that I spoke to?

Q. You don't have to give them now.

A. I will be glad to. Yesterday I happened to hear on the names, so I will give him all the names he wants. [61]

The next man I spoke to is a tavern owner. Although he tried to hide the fact that he would try to give the man a fair trial, he replied, "It would be a Southern trial, a man given a fair trial and then hanged, that idea in mind," but he definitely stated he would be prejudiced. That man's name is Johnny, I think Welch, or Walsh. He owns the Tavern on Hotel Street.

The other man I talked to was a man named Brock or Borck. He owns an amusement center. And he definitely said that he was prejudiced.

The other man I talked to is a man by the name of Mike Shapiro. He is a general salesman. Oh, he handles novelties, jewelry of all sorts, diamonds and that sort of thing, and he definitely made a statement that he was prejudiced, that he would not like to be on a jury, because he mentioned the fact about Will Rogers, "The only thing I know is

(Testimony of Arthur McGraw.)

what I read in the paper.” And that seems to be the impression that I had yesterday, most of the people I talked to in the past.

Q. Well, are there any other remarks from people whose names you may not remember, Mr. McGraw?

A. Oh, definitely. There are any number of people that I don't even know who they are. The reason I have heard so much about this is simply the fact that I have a leasehold on a large building in what is known, according to the papers, as “Little Harlem,” and, of course, most of my friends know I have the building down there and razz me about this particular case. They see it in the paper, and all that sort of thing, so I am more or less like that prize fighter's manager yesterday; people do ask me about the case.

Well, anything I know about the case would be this, that I myself, I know the man, but I would be prejudiced myself. I feel that I would not like to serve on a jury with people, because I definitely feel that they are prejudiced. A man may come into court not prejudiced and then can be made prejudiced by the evidence in court; I can understand that, but when a man comes in ahead of time and feels he is prejudiced against the man, I don't feel that is putting the law on its highest plane by not giving this man consideration——

Mr. Hoddick: One second. Your Honor, Mr. McGraw made the statement he felt other people

(Testimony of Arthur McGraw.)

were prejudiced. I move that that be stricken from the record on the ground that that is the issue that your Honor is called upon to decide. You can listen to the evidence, from which the inference might be drawn that other people are prejudiced, if there is prejudice in the community. It certainly isn't up to this witness.

The Court: He has been allowed to state his opinion over your objection. I will deny your motion to strike.

Q. (By Mr. Landau): Do you have knowledge or information about any other remarks or statements having been made [63] or passed in your presence, Mr. McGraw?

A. Well, as I mentioned before, I hear so many comments that I now just ignore them, but in yesterday's case the prosecution wanted names, so definitely I came today prepared to give you the names of people, because I feel that is his justification that he should have that to check on if he so desires. But there have been any number of people. I would safely say I have talked to and overheard at least 75 or 100 people.

Q. In the past two or three months?

A. Yes.

Q. And what was the nature of their remarks to you?

A. Well, it is just that most of them feel the man is guilty, he should be sent to jail. That is the nucleus of the whole thing.

(Testimony of Arthur McGraw.)

Q. In other words, you say that they have prejudged the man?

A. I would say that, yes.

Q. Irrespective of what the evidence may produce; is that correct?

A. I feel that they would be prejudiced, yes. In other words, from their conversation they implied that they are prejudiced. I wouldn't say they said they were prejudiced, except the ones I mentioned, but their conversation would lead anyone listening to it to feel that they were prejudiced. [64]

Q. You have inferentially answered this question, but I will ask it directly. In your opinion, Mr. McGraw——

Mr. Landau: Strike that.

Q. (By Mr. Landau): Do you, from these conversations that you have had, these statements that have been made in your presence, have an opinion as to whether or not there is prejudice in the community against the defendant as to these cases?

Mr. Hoddick: I make the same objection to that question as I did previously.

The Court: Overruled.

A. As an individual I definitely say there is prejudice, not only on my own part, but on the part of the people I have overheard discussing this case.

Q. (By Mr. Landau): And you believe that there is prejudice in the community generally, Mr. McGraw?

A. I am definitely surprised that there aren't

(Testimony of Arthur McGraw.)

more so-called haoles that haven't come up here to testify on this—in fact, that is the reason I have come up here, because from the display of witnesses that were here yesterday, evidently people just don't have—excuse the word—guts to come up here. I have no sympathy with what the man may be accused of. My sympathy is with the fact that this man should be given full consideration of the law and I believe I agree with the item in the local newspaper the other day, which we must all believe [65] in. I have forgotten who it was, but he said: A law is put on its highest plane if and when a man is given fullest consideration if and after all the evidence has been put against him.

Mr. Landau: Your witness.

Cross-Examination

By Mr. Hoddick:

Q. Mr. McGraw, you say you know Winston Churchill Henry?

A. I have known him a good long time as "Shorty." I didn't know the man as Winston Churchill Henry. I didn't know him as that until I would say the last two months.

Q. How did you happen to meet him?

A. I mentioned I own property on Smith Street, and colored people hang on Smith Street. He walked by there without knowing then this man, knowing his name, but, you know the individual.

Q. Has Henry rented property from you?

(Testimony of Arthur McGraw.)

A. No, sir.

Q. Have you had any business dealings with him?

A. No, sir.

Q. Have you had dealings with friends of his?

A. I don't know whether it is friends; people on Smith Street have dealt with me there, yes.

Q. Other colored people? [66]

A. Yes.

Q. Now, when did you have this conversation with Johnny Welch concerning prejudice in the community against Winston Churchill Henry?

A. This afternoon.

Q. That was this afternoon?

A. Yes. In fact two of these people, the salesman whose card appeared here and Mr. Welch. In fact, I just had a discussion with them over a cup of coffee about three-quarters of an hour ago.

Q. Where, in his tavern?

A. No, in a restaurant.

Q. What restaurant?

A. I don't know what name it is. Across the street from the Trade Winds on Hotel Street.

Q. And how about Mr. Brock? When did you speak to him?

A. I would say about three or four weeks ago.

Q. Did he bring up the subject or did you?

A. Well, he knows—He is a property owner on Hotel Street and he knows I have one property on Smith Street. That is how the question came up. They razz me about it.

Q. How about Mr. Shapiro? When did you see him?

(Testimony of Arthur McGraw.)

A. I saw him—I think the question came up about a week ago. [67]

Q. And where did you speak with him?

A. At his shop. He also has a shop on Hotel Street.

Q. Where is that located?

A. That is 35, I think, North Hotel Street. I think that is the address of the place.

Q. You have stated that you yourself would be prejudiced. Is that prejudice based on what you read in the newspapers?

A. Yes, I would say that 75 per cent of it is. The other would be hearsay from what I have heard from other people.

Q. And if you were called in here to serve on a jury and you were asked whether you could grant a man a fair and impartial trial, what would your answer be?

Mr. Landau: Just a moment, Mr. McGraw. I object to it, if the Court please. The individual belief of the witness is immaterial, whether he actually would or would not be prejudiced. It is a question of general prejudice in the community.

Mr. Hoddick: I think Mr. Landau mistakes the conversation proposition for the basic one. The Court can infer, if it is shown that there is general prejudice in the community, that a man cannot get a fair trial, but if it can be shown that he can be given a fair trial, the question of whether there is some prejudice is immaterial.

(Testimony of Arthur McGraw.)

Mr. Landau: We would have to question 530,000 people, if the Court please.

The Witness: Your Honor, could I answer that question?

The Court: Not at the moment. The only purpose that I can see that this question might have in this setting would be as to whether or not this man understands the nature of the condition of process, but as to whether he would be a qualified juror, if called, is not the question.

Mr. Hoddick: I am not asking if he would be a qualified juror, but whether, given this prejudice, he could take a seat in the jury box and cast his vote on the guilt or innocence of the man solely on the basis of the evidence adduced in court. After all, the strength of the prejudice has something to do with it, as well as the existence of the prejudice, whether he thinks that prejudice is so strong that regardless of the evidence he heard in court he would still have to return a verdict of guilty.

The Court: Again, I don't think at this point it is a question of whether this man would qualify if he were duly selected and summoned as a juror, but your question may have relevancy as to whether or not he understands what he has testified to.

Mr. Hoddick: That I also had in mind.

The Court: On that latter basis, and on that alone, you will be allowed to ask the question. [69]

Mr. Hoddick: Will you repeat the question, please.

(Testimony of Arthur McGraw.)

The Witness: You asked the question, I think——

Mr. Hoddick: I am asking the reporter.

(Question read.)

Mr. Landau: Do I understand that question is being permitted to test the man's credibility?

The Court: I think it ought to be rephrased, because, as worded, it directly relates to what I have ruled out. Rephrase your question.

Q. (By Mr. Hoddick): Mr. McGraw, you have stated that you have a prejudice against the defendant, Henry, by virtue of what you read in the papers and because of the things you have heard other people say. Is that prejudice so strong that it would influence you in determining Henry's guilt or innocence of the charges brought against him?

Mr. Landau: Object to the question, if the Court please, in that it is now singling out one man's prejudice, rather than the general prejudice.

Mr. Hoddick: How can you distinguish between one man's prejudice and the general prejudice? This man is part of the community.

Mr. Landau: Very simple. We don't say there are 530,000 people in the community who are prejudiced against him, but we are saying there are so many of them there is general prejudice. [70]

Mr. Hoddick: You say there are 50 men in the community or 75 men, by virtue of what this man tells us, who are prejudiced. But why isn't it proper for us to show that there are certain members of this community who are not prejudiced who have

(Testimony of Arthur McGraw.)

read the paper; and isn't it all the stronger if this man, who has talked with people who he believes are prejudiced, is not so prejudiced that he couldn't grant the man a fair trial.

The Court: I don't believe individual cases or instances on this point are going to be helpful. I think I have indicated I would allow your question only as to whether or not in relation to what he has testified to he understands the nature of the judicial process sufficiently to warrant a conclusion which he reaches. The fact that he may or may not be prejudiced and wouldn't be for that reason a juror who would be accepted in point of law, or whether fifty-nine others would or wouldn't be, is not the question at this stage. The question that we are concerned with is whether or not there is such a general prejudice in the community that it is unlikely that there could be selected twelve fair and impartial jurors that would give this defendant a fair trial in the cases that are pending in this court.

Mr. Hoddick: I have no further questions.

Mr. Landau: That is all, Mr. McGraw. Thank you.

The Court: Excused. [71]

(Witness excused.)

Mr. Landau: I am waiting for Mr. Berman who was supposed to be here at 2. I want to check outside.

WINSTON CHURCHILL HENRY

called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

Mr. Landau: For the purposes of the record, if the Court please, we are putting on the defendant himself just for this purpose and for no other.

Direct Examination

By Mr. Landau:

Q. Your name is Winston Churchill Henry?

A. That's right.

Q. Would you talk loud, Mr. Henry.

A. That's right.

Q. And you are the defendant in these two cases?

A. I am.

Q. Now, you understand the matter that is before the Court is to determine whether or not there is general prejudice in the community against you?

A. I do.

Q. Mr. Henry, in the past two or three months has anything been said to you or of you in your presence that would enable you to arrive at an opinion as to whether or not there is or is not prejudice against you? [72]

A. It have.

Q. Would you tell the Court the incident or incidents which cause you to arrive at that conclusion.

A. Well, from time to time that I have been talking with people who did not know that I was

(Testimony of Winston Churchill Henry.)

Winston Churchill Henry who have made remarks about what should be done, and if they were to serve as a jury or had anything to do with deciding of justice in my case, that what they would do, although at the time these people didn't know that I was the fellow who they was making the remark about.

Q. Did anybody in your presence, not knowing who you were, or perhaps even if they knew who you were, make any remarks to you about Southern justice or Texas justice?

A. Well, they seemed to think that I should enter some institution or penitentiary without a trial.

Q. Can you quote the words, or is that your impression from the words that were used?

A. Well, that was practically the words that was used, that they don't think that a fellow as Winston Churchill really should have a trial.

Q. Does that come from people of your race or people of other races?

A. Well, there was a few of my race and quite a few other races.

Q. Now, Mr. Henry, have you ever been the object of [73] sightseeing expeditions?

A. (Laughing): Yes, I have had people to come from the 1170 $\frac{1}{2}$ Smith Street to 1182, wants to know who is this notorious character Winston Churchill Henry.

Q. People you say have come down to see who you were?

A. That is correct.

(Testimony of Winston Churchill Henry.)

Q. Now, in your opinion, Mr. Henry, do you feel that if you were tried by a jury in this district that you would be able to get a fair and impartial trial? A. I do not.

Mr. Hoddick: I will object to that, first of all, that there is no showing of the fact that the witness on the stand has an understanding of what a fair and impartial trial is, not competent to answer the question; and again the witness is deciding what the Court is called upon, upon a hearing of this motion, to decide.

Mr. Landau: I will withdraw the question.

The Court: The answer may be stricken.

Q. (By Mr. Landau): Let's put it this way: Do you feel, from the statements that have been made in your presence and to you and the fact that you have been the subject of some of these sight-seeing trips by people, that you could render an opinion as to whether or not there is or is not prejudice in the community? Just answer "yes" or "no."

A. Well, I would say that there is prejudice, yes. [74]

Q. Just answer the question "yes" or "no," Mr. Henry. Do you feel that you could render an opinion as to whether or not there is or is not prejudice? A. Well, yes, there is.

Q. Could you——

Mr. Landau: I know there will be an objection to the next question, your Honor, and I want to give Counsel an opportunity to object.

(Testimony of Winston Churchill Henry.)

Q. In other words, you feel that you could render an opinion as to whether or not there is prejudice?
A. Yes.

Q. All right. Now, in your opinion, do you feel that there is or is not prejudice against you in this community?

Mr. Hoddick: I will object to that on the same grounds as I just stated.

The Court: Overruled.

Q. (By Mr. Landau): What is your answer to that question?
A. Yes.

Q. You feel that there is?
A. Yes.

Mr. Landau: Your witness, Mr. Hoddick.

Mr. Hoddick: No questions.

Mr. Landau: Step down.

The Court: Excused.

(Witness excused.) [75]

MARY NOONAN

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

Direct Examination

By Mr. Landau:

Q. What is your name, please?

A. Mary Noonan.

Q. And where do you reside, Miss Noonan?

(Testimony of Mary Noonan.)

A. Pukalani Place, Kaimuki.

Q. And are you employed in Honolulu?

A. Yes, I am.

Q. In what capacity, Miss Noonan?

A. As director of the Civic Forum and executive secretary of the Republican Club.

Q. Now, Miss Noonan, in your word have you had occasion to hear, within the past two or three months, remarks or statements concerning the defendant Winston Churchill Henry? A. Yes.

Q. And can you tell me whether those were few or many? A. I would say many.

Q. Many. Now, Miss Noonan, would you tell the Court the tenor of those remarks or statements that were made concerning this defendant?

A. They had to do with the moral value—concerning what [76] did you say?

Q. Mr. Henry.

A. It was more with the case of Mr. Henry. It had to do with the moral values, as opposed to legal values.

Q. And what was the nature——

Mr. Hoddick: Excuse me. Will you repeat that answer, please, Miss Noonan. I didn't get it.

The Witness: They had to do with moral values of the case as opposed to legal values.

Q. (By Mr. Landau): Would you explain and elucidate a little more, Miss Noonan?

A. They were to the effect that—I don't want to give the wrong impression, but to the effect that

(Testimony of Mary Noonan.)

there was wrong and it didn't matter what the law provided, it was wrong regardless of the provision of the law.

Q. Well, now, were there any remarks made to you about the manner in which this case, or these cases, should be disposed of?

A. I don't think—the manner did you say?

Q. Yes. In other words, I am thinking, was any remark made to you about Southern or Texas justice, using that phrase, or phrases that meant that?

A. No.

Q. When you say “with reference to the moral values as distinguished from the legal values of the case,” can you [77] remember any particular phraseology or words that were used by some of these people, so that we can understand you?

A. Yes, one had to do with crime such as this was worse than Communism. Another had to do with that it didn't matter what the—it didn't matter—well, the exact words were: It didn't matter what the law provided, it was wrong before it started; therefore people like this should not be defended or brought to court, that it was just wrong.

Q. In other words, people that were charged with this type of offense shouldn't be given the opportunity of being tried, but should be punished immediately; is that correct?

A. Yes. Perhaps I could express it better by repeating portions of the conversation in which it was suggested by someone that if the law was wrong,

(Testimony of Mary Noonan.)

that the way to take care of it was to get the law changed, but that the person being tried should be tried under the existing law rather than by opinion.

Q. I didn't get that.

A. In a conversation in which they were discussing the rights and wrongs of this particular case, one person brought out the fact that it was wrong. Someone said, but the law provided that he be given a trial, and the phrase used "within the skeleton of the law," he should be given all the justice that was due him. I am trying to use the phrases I have heard. The person who seemed to be of a prejudiced mind felt that [78] that didn't matter: regardless of the law, people, or cases like this, should not be tried. Then the other person came back and said: "Why not? If you think they shouldn't be tried, shouldn't you change the law rather than judging the person under a law that does not exist or under your own opinion?" And those were the phrases that I heard.

Q. In other words, it was a conversation between two people. One person said we shouldn't even bother trying this man and the other person said, well, as long as the law says we have got to try him, we should; is that correct? A. Yes.

Q. Do you remember any other conversations, Miss Noonan, or statements made concerning this?

A. There were conversations regarding it. Many people felt that all the publicity in this particular case was so much greater than generally speaking

(Testimony of Mary Noonan.)

that that also was an indication of that the trial should not go on further.

Q. What does that mean? That he should be punished without trial, or that he shouldn't be tried here?

A. I don't know what it meant. I am only repeating the phrases or expressions I have heard.

Q. Do you remember any others, Miss Noonan?

A. I don't think so.

Q. Beg pardon?

A. No, I don't think I do. Most of them have been [79] centered on this "right and wrong regardless," and they have been general conversations.

Q. Well, now, from these general conversations, Miss Noonan, are you in a position to be able to give this Court—and the answer is just "yes" or "no" at this time—an opinion as to whether or not there is prejudice in the community against this defendant? A. Yes.

Q. In your opinion, Miss Noonan, will you tell us whether or not there is or is not prejudice in the community against this defendant? A. Yes.

Q. You believe that there is prejudice?

A. Yes.

Mr. Landau: Your witness.

Cross-Examination

By Mr. Hoddick:

Q. That is, Miss Noonan, you believe there are

(Testimony of Mary Noonan.)

people in the community who are prejudiced against the defendant? A. Yes.

Q. And is it not also true that from these conversations that you overheard it is your opinion that there are people in the community who are not prejudiced?

A. Yes, I think that would be a fair statement.

Mr. Hoddick: No further questions. [80]

The Court: I have a question to ask. Do you know, personally, what this defendant is charged with in this court?

The Witness: No, I don't, in detail, just generally what I have heard discussed.

The Court: Generally what do you think he is here charged with?

The Witness: I have heard he is charged with dealing in traffic with women and in drugs.

The Court: Do you know whether or not the people who voiced these opinions you have just testified to knew what he was charged with in this court in these two cases?

The Witness: I would have no way of knowing that.

The Court: Thank you.

Redirect Examination

By Mr. Landau:

Q. Miss Noonan, as a matter of fact, you and I did not speak to each other about this case; I did not question you before I put you on the stand at all? A. No.

(Testimony of Mary Noonan.)

Recross-Examination

By Mr. Hoddick:

Q. One further question, Miss Noonan. You said this conversation you heard was in reference to a particular case. Did you mean the case here in Federal Court, or did you mean the case in the Territorial Court where the prosecution, I [81] believe, was unable to produce a witness one day and it had quite a bit of publicity in the paper? Do you remember what case it was?

Mr. Landau: Pardon me, Counsel. The witness has testified that it was dealing in narcotics, traffic in narcotics, and of course that is a Federal case, not a Territorial case.

The Court: Previously she mentioned in her direct testimony about the case.

Mr. Landau: I had limited my questioning, in accordance with your Honor's suggestion yesterday, to the cases that are in this court.

The Court: I know you did, but I want to find out if she knew what you were talking about. Now Mr. Hoddick wants to know if the people she referred to as talking about the case had some particular case in mind. You may answer the question.

The Witness: I wouldn't know what they had in mind. I only know the general tone of the conversations and the phrases that I have repeated and from what I told you,—

Mr. Hoddick: That is all right. No further questions.

The Court: All right. Thank you.

(Witness excused.)

Mr. Landau: May we have a five-minute recess. I am waiting for one witness who is in the Territorial Court. [82]

The Court: All right, we will take a short recess.

(Recess had.)

Mr. Landau: I am sorry, if the Court please, my witness has not yet made an appearance, and rather than delay this case any longer, I will rest at the moment.

The Court: Very well. Does the Government have evidence to present?

Mr. Hoddick: May it please the Court, this might be an opportune moment, before putting on any evidence, to show that the motion should not be granted. I will call the Court's attention that all of the evidence put on by the defendant in this case so far on the hearing on this motion is speculative as far as the question of whether an impartial jury could be selected from the community or not, and with reference to that I call the Court's attention to the last used Eisler case.

The Court: Well, let's argue the matter later, unless this has some relevancy to what you are going to put on as evidence.

Mr. Hoddick: May it please the Court, what I had in mind was if you adopt that opinion, it will not be necessary for us to put on any evidence.

The Court: You never can tell what I am going

to do. You make up your mind as to whether or not you are going to put on any evidence. [83]

Perchance, is the person who just walked in the room your witness

Mr. Landau: No, your Honor. He is a member of the Bar.

Mr. Hoddick: I will call Mr. Lansing to the stand, please.

NELSON BAKER LANSING

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down.

Direct Examination

By Mr. Hoddick:

Q. Will you give your full name, please.

A. Nelson Baker Lansing.

Q. And where do you reside, Mr. Lansing?

A. 2711 Nuuanu.

Q. And how long have you been in the Territory of Hawaii? A. Since July 31, 1883.

Q. What is your business at this time?

A. Real estate salesman.

Q. Have you read about the defendant in this cause, Winston Churchill Henry?

A. I have read something about him.

Q. That is in the newspapers? [84]

A. In the newspapers, yes.

(Testimony of Nelson Baker Lansing.)

Q. And were those articles which you read antagonistic, would you say, toward Mr. Henry?

A. I wouldn't say so.

Mr. Landau: I object to the question. For the purposes of the objection may the answer at least be suspended.

The Court: All right.

Mr. Landau: The fact that he has read some articles which may not have been discriminatory or otherwise against the particular defendant is immaterial. The question is: Has he read all the articles? At least, I mean, if he is going to go into that question at all.

The Court: He is answering questions that are asked of him. You can ask him that.

Mr. Landau: I want to object to the question, if the Court please, on the ground it has no relevancy or materiality in this issue.

The Court: If it doesn't cover all the articles that have been written, I think you can cover them.

Mr. Hoddick: Your Honor, was the objection overruled?

The Court: It is overruled. The answer may come in.

Q. (By Mr. Hoddick): Were the articles which you read, Mr. Lansing, friendly to the defendant, Mr. Henry? [85]

A. I just think they are just a matter of news. I wouldn't say they were one way or the other.

Q. On the question of whether the defendant,

(Testimony of Nelson Baker Lansing.)

Mr. Henry, is guilty or innocent of the charges now pending in this court, have you been influenced by the articles which you read?

Mr. Landau: I object to it, if the Court please, on the ground it is incompetent, irrelevant, and immaterial. We don't know what articles he has read. We don't know whether he has read them all. What he would do as an individual is immaterial, whether he has been influenced by it, if the Court pleases. We are talking about a generality. I think that is the only issue. Is there in this community a feeling of prejudice, not what isolated individuals would feel like.

Mr. Hoddick: May it please the Court, the basic issue is: Can we select a jury of twelve men in this community with sufficient ease to warrant having the case tried here so that the case would not be removed? Mr. Landau has endeavored to show that cannot be done by bringing in people who have testified to statements they have heard other people make and on the basis of conclusions which they have drawn from the statements other people make, and from that we are to infer we cannot select such a jury. Why can't this Court infer from the fact that I can produce people in [86] court who can state they can serve as fair and impartial jurors, or that they have no prejudice against Henry as a result of these newspaper articles, or anything else they have heard about him, and from that give your Honor an opportunity to fairly judge whether a jury can be selected or not?

(Testimony of Nelson Baker Lansing.)

The Court: That isn't the question at this stage. The question is simply whether or not there is generally in the community a body of people who are not prejudiced from whom a jury can be selected. The fact that this man is personally testifying, or would testify, that he isn't doesn't establish that there is a substantial body of citizens who are not prejudiced.

I will let you bring out testimony just generally on the subject of a sizable portion of the population being not prejudiced, just as I allowed him to show that, according to his witnesses, there was a sizable portion of the population who were prejudiced.

Mr. Hoddick: Your Honor, the defendant has perhaps shown, or at least there is some basis perhaps for feeling, that maybe 120 people, if that many, felt a prejudice against the defendant. Why can't the Government come in here with 120 people, or 150 people, and show that they are not prejudiced. There is no question of inference there. It is a matter of fact.

The Court: Simply because I won't let you do it; that is the reason. We won't get down to individual cases. We are talking generalities. I won't let you put on specific individuals to testify that they are or are not prejudiced because they are not being called as jurors. The question is: Is there not such a prejudice in the community that this man cannot be given a fair trial in these cases? That is the question.

(Testimony of Nelson Baker Lansing.)

Mr. Hoddick: And, your Honor, isn't it proper for us to put on specific persons to testify that they are not prejudiced so that you know that that much prejudice does not exist?

The Court: I don't think so, any more than I would allow Mr. Landau to bring in 59 people to say they were prejudiced. It would become a question of a contest of who could bring up the most individuals and "trot" them into the court room.

Mr. Hoddick: The question is whether with reasonable facility a fair and impartial jury can be drawn. It is a question of how widespread the prejudice is.

The Court: Regardless of how you feel on it, I am not going to let you get down to specific cases.

Q. (By Mr. Hoddick): Have you discussed this——

Mr. Hoddick: I would like to make one further comment for the record.

The Court: Yes. [88]

Mr. Hoddick: Apparently Mr. Landau is building his motion on two facets. One is widespread newspaper publication from which he would have your Honor infer that most people have read adverse comments about Mr. Henry and therefore must be prejudiced, whether they could testify to that fact or not from the stand as individuals; and, second, that there does exist a prejudice in the community which can be inferred from statements which these people made to the witnesses which he called.

(Testimony of Nelson Baker Lansing.)

And as far as the effect of the newspaper publicity in the community is concerned, I think it is only proper to ask the individual witness how he has been affected by such newspaper publicity. It hasn't been covered by statements made to the witnesses which Mr. Landau put on the stand.

The Court: The question is still the general effect of those newspaper publications upon the community as a whole. If this man has circulated in the community to the extent that he can feel the temper of the times with reference to this subject, I will let him testify, but the fact that he may testify that in having read these articles he is affected one way or the other doesn't help me at all.

Q. (By Mr. Hoddick): Mr. Lansing, have you discussed the cases which have been publicized in the newspaper concerning Mr. Henry with other people?

A. Well, we have at lunch time, yes.

Q. With divers other persons? [89]

A. Yes, a number of other persons.

Q. And where do you usually take your lunch?

A. Capitol Restaurant.

Q. From your conversations with these other people do you think that you are in a position to testify as to whether prejudice exists in this community or not against the defendant?

A. As far as my circle is concerned, yes.

Q. And do you think that prejudice does exist in this community?

(Testimony of Nelson Baker Lansing.)

Mr. Landau: Objected to, if the Court pleases, until we get some basis for a conclusion. Let's get some remarks, if any, or statements, what statements were made. If a man is going to render a conclusion, let's find out what he bases his conclusion on. At least that is what I try to do.

The Court: He can state whether he has a basis for forming an opinion, and he can give his basis for it.

Mr. Landau: The last question was what his opinion was before getting the basis.

The Court: Well, I think it is six of one and half a dozen of the other whether you give your reasons before you give your opinion or give your opinion and then give your reasons. The witness may answer and give his reasons.

The Witness: I have kind of lost the question now. [90]

Q. (By Mr. Hoddick): The question, Mr. Lansing, was whether from these conversations which you have had with your friends at lunch at the Capitol Market and elsewhere there does exist in this community—it is your opinion that there exists in this community a prejudice against the defendant Winston Churchill Henry.

A. Well, I think it is about 50-50.

Q. You mean you think about 50 per cent of the people are prejudiced and 50 per cent aren't?

A. That word "prejudiced" kind of gets me. About 50 per cent believe he is guilty and 50 per cent believe he is not as guilty as they say he is.

(Testimony of Nelson Baker Lansing.)

The Court: As guilty?

The Witness: As guilty.

Q. (By Mr. Hoddick): Now, what statements can you recall, or what conversations in particular, which lead you to that conclusion?

A. No, I couldn't state. I don't remember the conversations enough.

Q. Have these people with whom you have spoken indicated that they feel that Henry—the 50 per cent who you say do not think he is guilty——

A. As guilty as they say he is.

Q. Now, do those people—have they indicated that, by stating that, they think he should be given a fair trial? [91]

Mr. Landau: I object to it, if the Court pleases. It is not only leading and suggestive, but it is not within the realm of this particular question, the question that has been put to this witness. The witness has testified. I think it is improper for Counsel to try to put words in the witness' mouth.

The Court: As I understand the witness, the people with whom he has conversed on the subject all believe the defendant Henry to be guilty, but some don't believe him as guilty as others believe him. Isn't that what you are telling me?

The Witness: Yes, and in most of the cases they think he should be sent out of the country, be glad to get rid of him.

Q. (By Mr. Hoddick): Have any persons, Mr. Lansing, with whom you have spoken, indicated

(Testimony of Nelson Baker Lansing.)

that they did not feel that the defendant Henry deserved a trial?

A. Oh, they all believe that he deserves a trial.

Q. And from your conversation with them are you disposed to think that they have prejudged Mr. Henry's guilt? A. Not necessarily.

Mr. Landau: I object. I think the witness has already answered that, if the Court please, quite decisively to questions by Counsel and by the Court.

Mr. Hoddick: I think the witness should have an [92] opportunity to elaborate properly on those answers so that he can convey to the Court and myself and Mr. Landau what he meant by it.

The Court: All right, if you can clear it up; I will allow the answer to stand.

Mr. Hoddick: I don't have any further questions.

Cross-Examination

By Mr. Landau:

Q. You have heard the expression, "Let's give him a fair trial and hang him," Mr. Lansing?

A. No, I haven't.

Q. Never have? A. No.

Mr. Landau: That is all.

The Court: Excused.

(Witness excused.)

Mr. Hoddick: Mr. Murphy, please.

BYRON KENT MURPHY

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hoddick:

Q. Mr. Murphy, will you give your full name, please. A. Byron Kent Murphy.

Q. Where do you live? [93]

A. 4005 Round Top Drive.

Q. And what is your occupation?

A. Real estate broker.

Q. How long have you been in the Territory of Hawaii? A. March, 1940.

Q. Have you discussed the case of Winston Churchill Henry, or any of the cases in which he has been involved, with your friends or other people? A. I have discussed it, yes.

Q. With many people or just a few?

A. Few, comparatively. The ones I come in contact with, very few.

Q. Would you care to approximate as to how many, ten, fifteen?

A. For over what period of time do you want me to indicate?

Q. Ever since you first discussed Winston Churchill Henry with anybody, from the start.

A. I would say I might have been in a conversation concerning Winston Churchill Henry, say 20 times since I first heard there was such a person.

(Testimony of Byron Kent Murphy)

Q. And do you remember any specific conversations that you can give the details of to the Court and to myself and Mr. Landau?

A. None that I could give any detail to, no. [94]

Q. Your references are general rather than specific?

A. Yes.

Q. And from those conversations that you have had—were those conversations generated by articles which the people with whom you conversed and yourself had read in the newspapers?

A. Yes, oh, yes.

Q. For the most part?

A. Practically in every case, because otherwise there would be no way of knowing about it. The paper initiated the discussion, the news articles, that is.

Q. And from those conversations did you gather that the people with whom you discussed Henry felt that he did not deserve a trial?

Mr. Landau: Objected to. That isn't the question, if the Court pleases. The question is whether or not there is prejudice.

The Court: That is right.

Q. (By Mr. Hoddick): And those people with whom you discussed Henry, was it your opinion that they were prejudiced against Henry?

A. I will say generally no.

Q. Where have you had these conversations, at lunch, and so on?

A. Oh, and so on, yes, various times and various places. [95]

(Testimony of Byron Kent Murphy)

Q. Did the people with whom you discussed Henry seem to feel that this newspaper publicity which he had received was the normal thing which happens when a man becomes enmeshed with the law at frequent occasions?

Mr. Landau: I object to it as leading and suggestive, if the Court please, and I think——

The Court: Sustained.

Mr. Landau: I think——

The Court: Sustained.

Mr. Landau: I want to add another objection.

The Court: One is enough.

Mr. Landau: On another matter. I would like to be heard.

The Court: All right.

Mr. Landau: This witness has given an opinion. I had objected previously to the witness giving an opinion unless he gave facts, and the Court said it didn't matter whether he gave his opinion and facts later. Now the man has given an opinion, let's get the facts before we go over to something else.

The Court: Are you making a suggestion to me or to Mr. Hoddick?

Mr. Landau: I am making a suggestion to Court and Counsel.

Mr. Hoddick: He has given the facts to the best of [96] his recollection. These constitute things over a period of time, a period of exposure. He cannot be expected to remember specific details.

Mr. Landau: May I inform Counsel for the Gov-

(Testimony of Byron Kent Murphy)

ernment that I did not have a witness express an opinion until he had given facts on which he could base an opinion.

The Court: Opinions unsupported by facts are of no value.

Mr. Landau: I didn't get you.

The Court: Opinions unsupported by facts are of little value; facts or reason.

Mr. Hoddick: I have no further questions.

Cross-Examination

By Mr. Landau:

Q. You say, Mr. Murphy, that there is generally no prejudice. You will also admit that there was some prejudice, was there not, Mr. Murphy?

A. I think there is prejudice in any issue there is, because it is Winston Churchill Henry or anything else, there is always prejudice in the community about something.

Q. At least, this was a subject of many conversations with you?

A. I estimated twenty over a period of, say, six or seven months, yes. I wouldn't call that many.

Q. Mr. Murphy, how did you happen to come on the [97] witness stand?

A. I was having luncheon at Woody's Luncheon across the street. Mr. Hoddick approached me and asked me if I had seen any articles in the newspapers regarding——

(Testimony of Byron Kent Murphy)

Q. Without going into what he told you, he questioned you and then put you on the stand; is that correct? He asked you some questions at Woody's and asked you to appear as a witness?

A. I would like to explain it in full or it doesn't give a fair answer.

The Court: Go ahead.

The Witness: He asked me if I had seen any articles in the newspaper regarding Winston Churchill Henry, and I said I had. He said, "If in the event you were selected to sit on a jury, would you be influenced by the articles you read in the newspaper in an effort to either convict or release this man of those charges?"

I said that I would not be influenced by anything that I had read but only by what would be presented to the Court and the jury.

Q. (By Mr. Landau): And as a result of your conversation he asked you to appear as a witness?

A. Then, not until I had made that statement, then he said—asked me to appear as a witness.

Mr. Landau: I don't believe that the statement which [98] the witness gave is of any evidential value on this matter, but in order to avoid any possibility of doubt, the testimony which he has given is on the same line as Counsel tried to bring out through a previous witness, which was not admitted; the witness answered a question at length, not in direct answer to my questions, and for the purposes of the evidence in this case I ask that that be stricken.

(Testimony of Byron Kent Murphy)

The Court: You asked him how he happened to be here and he told you.

Mr. Landau: Yes.

The Court: That answer relates to how he happens to be here.

Mr. Landau: Only to that.

The Court: That is right.

Mr. Landau: That is all.

The Court: Any further questions?

Mr. Hoddick: No further questions.

The Court: Excused.

(Witness excused.)

Mr. Hoddick: That is all, your Honor.

The Court: Rebuttal?

Mr. Landau: May I put Mr. Berman on, if the Court pleases, the witness I have been waiting for?

EDWARD BERMAN

called as a witness on behalf of the Plaintiff, being first [99] duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Landau:

Q. What is your name, please?

A. Edward Berman.

Q. And what is your profession?

A. Attorney-at-law.

Q. Mr. Berman, you are here at my request as a witness in this case?

A. That's right.

(Testimony of Edward Berman)

Q. I discussed this matter with you a little before 2 o'clock this afternoon?

A. That is true.

Q. And asked you, after talking to you, to appear as a witness in this case?

A. That's right.

Q. Now, Mr. Berman, have you, either in your professional capacity or as an average citizen of the Territory, had discussions, or have you heard comments or statements made, about the defendant Henry with reference to these cases in this court?

A. I have.

Q. Will you tell the Court to the best of your recollection what some of those conversations, comments, or statements were? [100]

A. Well, it so happens that I belong to what we informally call a breakfast club. We have our breakfast at the Young Hotel practically every day of the week. On at least two occasions when this publicity about this case got into the newspapers, I heard some very definite comments about the individual Winston Churchill Henry.

Q. Will you tell us what those comments were, Mr. Berman?

A. Well, on one of these occasions there had been some publicity in the newspaper that morning about the Henry case or cases, and one of the individuals specifically at the breakfast table—I don't know how the conversation began, but I believe he had referred to the newspaper article—made some

(Testimony of Edward Berman)

comments which—of course, there were no ladies present—but they were to the effect that this “son-of-a-bitch” ought to be gotten out of town; and they were referring to the type of offense in particular, or specifically; and we ought to run the “S.O.B.” out of town. And the comments around the table by the other people just reiterated the statement that was made at the breakfast table.

Q. Were there any other comments along those lines?

A. There was another occasion where there were other people, and I think it was two or three days later, where this thing had seemed to be in the papers every day during that period or was being discussed when the conversation was along that line by another individual. [101]

Q. Along the same line? A. Same line.

Q. Were there any conversations, statements, or remarks made or passed in your presence not at this particular breakfast club?

A. I have heard comments on the street by individuals, but not as defamatory as the ones made at the Young Hotel.

Q. What was the purport of those statements and remarks you heard on the street?

A. There was a reference in one case to the offense in particular, that that kind of stuff shouldn't be allowed here, and “we don't want people like that in Hawaii,” words to that effect, but not as strongly phrased as the comments I heard at the Young.

(Testimony of Edward Berman)

Q. Do you know what we mean by "Texas justice,"? Mr. Berman.

A. Texas justice?

Q. Yes, that is the expression "Let's give him a fair trial and hang the guy."

A. I have heard the expression. I have heard that.

Q. Were any of these remarks along that category or order?

A. I would say that the remarks at the Young Hotel by the people present would fit into that category.

Q. As a result of these conversations and remarks that [102] have been made do you believe that you would be in a position to give—venture an opinion as to whether or not prejudice does or does not exist in this community against this defendant? Answer that "yes" or "no." Do you feel you can render an opinion?

A. If the sentiment I heard at the Young Hotel is the general sentiment in this community, and I have picked it up on a few occasions I have mentioned here, I would say he wouldn't get one. I say if that is the general sentiment. I haven't discussed this with more than nine people if I could put it down in actual numbers. Altogether I would say there were nine, five people on one occasion, four on another, and individuals on the street, maybe an occasional individual, which I couldn't tell one way or other. If that is the general opinion here—if I

(Testimony of Edward Berman)

can answer it that way, your Honor—I would say “no.”

Q. At least from the conversations you had at least in that circle, that group?

A. That particular group, I would say “no.”

Q. He couldn't get a fair trial?

A. Not with that group, not the way they acted that morning. I don't know how they are acting today, but the sentiments expressed that morning were, in my estimation, very prejudicial to this person.

Mr. Landau: That is all. [103]

Cross-Examination

By Mr. Hoddick:

Q. Mr. Berman, about when was the last time you had such a conversation?

A. I would say approximately two weeks ago.

Q. All of the people with whom you discussed Mr. Henry, or who discussed Mr. Henry with you, expressed themselves in a prejudicial manner?

A. I wouldn't say the nine people that were at these two occasions at the breakfast club, but I would say on one occasion either two or three of them and on another occasion at least three of them, and others remained silent, as I did, on the subject.

Q. Did anybody speak affirmatively?

A. In what sense?

(Testimony of Edward Berman)

Q. In a non-prejudicial manner.

A. Nobody spoke in any way except those who expressed themselves in a prejudicial manner.

Q. Have you heard anything said in the community that was non-prejudicial?

A. I have never heard a good word about this fellow.

Mr. Hoddick: No further questions.

The Court: Mr. Berman, do you know what the charges against this defendant are in this court?

The Witness: Well, from the comment that day I [104] gather that it dealt with narcotics.

The Court: Do you know whether or not the people whom you referred to as expressing opinions that you have reiterated knew what the defendant was charged with in this court?

The Witness: No, your Honor. I would say they were reputable businessmen in this community. I could mention their names here, if the Court wishes to hear some of the people present on that occasion.

The Court: I don't. I am simply asking whether or not you knew whether they knew what case they were talking about.

The Witness: Oh, yes, they referred to it.

The Court: What?

The Witness: To the narcotics, Federal offense. A whole gamut of crimes were mentioned at the breakfast table.

The Court: You have also indicated that if the sentiment of the community generally is like the

(Testimony of Edward Berman)

beliefs and opinions entertained by these nine people, you would say there would exist general prejudice in this community against the defendant?

The Witness: I would say "yes."

The Court: If it exists, but I take it you don't know whether it does or not? [105]

The Witness: Well, that is a very difficult question to answer.

The Court: That is the question we are interested in.

The Witness: These contacts, these statements, were not solicited by me. They came about casually as a result of meetings with people for breakfast. Nobody came there to discuss Winston Churchill Henry. They just came up casually as part of the usual discussions one has at breakfast about current affairs, so they automatically arose at these meetings, and that was the sentiment that I got, that I gathered, that——

The Court: But again on the basis of that you say if that represents the thinking and feeling of the community, you would conclude that prejudice, to a general extent, against this defendant exists?

The Witness: Yes.

The Court: I again ask you if you know whether that "if" is a fact or not?

The Witness: My contacts, or my experience, with this particular situation, your Honor, are limited to these particular occasions, and I can only express a statement as to those occasions.

(Testimony of Edward Berman)

The Court: So all you can talk about are nine people? [106]

The Witness: On three different occasions, yes.

The Court: All right.

Redirect Examination

By Mr. Landau:

Q. Mr. Berman, these people that you have discussed, are they in any one particular walk of life, or many walks of life?

A. Many walks of life.

Q. And they all associate, as far as you know, with the same people, or many, many people?

A. I would say they associate with many, many people. They are businessmen, small businessmen.

Q. Did any of them express, during the conversation, any statements made by other people in their presence, or anything of that nature?

Mr. Hoddick: May it please the Court, I have been objecting all through the course of this proceeding to the witnesses' testifying as to what people told them. I think we are compounding our hearsay to a point which should not be permitted.

The Court: What is the question?

Mr. Landau: The question is whether any of the people he had spoken to made any remarks indicating whether other people had spoken to them. I will withdraw the question.

The Court: That is compound hearsay. [107]

Mr. Landau: That is all. Thank you, Mr. Berman.

(Witness excused.)

Mr. Landau: That is all, if the Court pleases.

The Court: What have you proven?

Mr. Landau: I beg your pardon.

The Court: What have you proven?

Mr. Landau: I have proven prejudice, if the Court pleases, in this community. I have proven it through many, many instances. I have not been able to take the community and divide it in a certain number of segments and say in each of these segments there is prejudice. I think I have gone into the matter thoroughly and sufficiently, if the Court pleases, to give the Court a sufficient understanding of the fact that there is prejudice. True, we haven't been able to get everybody in, but we have enough people here to give you an undercurrent and tenor of the people in this community.

Here is Mr. Berman with one little group, and that group, makes remarks; Miss Noonan in her various work has come across people who have indicated that in their opinion this man shouldn't even be given a trial, irrespective of what the law says, that he is entitled to a trial; Mr. Lampley, who testified yesterday about the time he was in Hilo and the times he was here in Honolulu about remarks that have been passed, statements that have been passed; Mr. McGraw, who has testified of a wide acquaintanceship and many, many conversations with different people. I think that we have a pretty clear cross-section of the community, if the Court pleases, in the testimony of these witnesses, and the Court certainly won't, and doesn't, expect

me to bring in 100 per cent segmentation, but I imagine that the effect of the testimony which I have produced is along the line of a Gallup poll. We have a few people in various portions of the community and from that we can render an opinion as to what the rest of the people are thinking about. It is true they were a little mistaken in the last National election, but they have proven pretty accurate, and they go on a certain percentage. They don't take 60 per cent of 140,000,000 people. They may only touch upon one or two thousand people in the entire National poll and arrive at their figures that way. It is all we can and are expected to do in this case, if the Court pleases.

I believe even Mr. Lansing, Government's own witness, who was brought in to testify that there was no prejudice—and what did he say? He said this prejudice is about 50-50. When the Court asked him what he meant by that, he said 50 per cent of the people say he is guilty and the other 50 per cent say he is not quite as guilty as they say he is. In other words, they are all of the impression that this guy is guilty. Pau! Some of them aren't as firm about it as others, but that is their belief. That is, 100 per cent, in his estimation, of the people. And he was asked also: What [109] have some of the remarks been? And he carried out the general tenor of all the witnesses for this defendant, if the Court pleases, when he said that in most cases they believe he should be sent out of the country and we get rid of him. I don't know whether your Honor noticed

he was a little "hot" then. He was pretty vehement about that. And that is his feeling, that this man ought to be gotten out of the country: We ought to get rid of him. That is the opinion of the people in this community, if the Court pleases, and that is why I feel we cannot draw an impartial jury. I don't believe we can give this man a fair and impartial trial, which I know the Court wants him to have.

I haven't discussed the question of the newspaper articles yet.

The Court: I thought you were through.

Mr. Landau: But your Honor asked me one question about that one phase. If your Honor wants me to go into the question of the articles I certainly will.

The Court: Yes.

Mr. Landau: I want to try to get these in order of dates, if the Court pleases, although I guess it isn't too important. Apparently the first one that I have right here is the editorial of August 10, which is Defendant's Exhibit 6, entitled "Ubiquitous Mr. Henry."

Frankly, I don't know what that means, but I know it is [110] not intended to be complimentary.

"Ubiquitous Mr. Henry"

"Mr. Winston Churchill Henry has been entirely too much in Honolulu's police news during the past two years. He has been arrested on eight occasions, charged with seventeen violations of the law."

Now here they say he has been arrested. If the Court pleases, I am talking now about cases in the Territorial courts where all kinds of convictions, even for minor misdemeanors, would be able to have been introduced to impeach a man's credibility. They say:

"He has been arrested on eight occasions, charged with seventeen violations of the law. Each time he has quickly been released on bond, many times being re-arrested under conditions that seemed like a resumption of the offenses charged before previous accusations against him have been disposed of by the courts.

"He has paid one fine of \$10.00. . . ."

They didn't say, if the Court pleases, that that fine for \$10 was for spitting on the sidewalk.

"He has paid one fine of \$10.00, delayed another of \$200.00 by a notice of appeal. He has been sentenced to two terms of sixty days in jail, with subsequent suspended sentences of thirteen months, and regained his liberty on bond by notice of appeal. [111]

"His first arrest here——"

They are arrests and not convictions.

"His first arrest here—his record shows seventeen prior arrests on the mainland—was two years ago, August 25, 1947, on a charge of 'soliciting.' Five months later the case against him was dropped by a 'nolle prosequi,' unwill-

ingness to prosecute. Police records indicate evidence that marked money given to him was found shortly thereafter in a woman's possession.

"Since then he was found guilty of assaulting policemen,——"

And this at the time, if the Court pleases, when that conviction was on appeal.

"——was the central figure in five raids on barricaded premises at Waikiki and on a woman's abode on Husten Street. Narcotics, gambling devices, illicit firearms, women were found by the raiders. Each time Henry was freed on bond. He is at liberty now after arrest early Sunday morning.

"This man stands convicted of assaulting policemen."

And that isn't the truth because the case was on appeal at the time.

"He is found repeatedly in situations that require his arrest. Yet he manages to stay in circulation. To the layman it appears that his innocence or guilt should be established within the shortest possible time, and that in [112] the meantime some way might be found whereby the police can account for all his actions at all times.

"Whatever the technicalities of the law may be, Winston Churchill Henry has shown with-

out question that he contributes nothing to the social and moral welfare of Honolulu.”

This, if the Court pleases, is editorial comment. It is an editorial comment not only on pending matters but on a matter which could have no other possible reason for its existence except to inflame and prejudice people. In some of these articles I will read as we go along there may be something that has a news-worthy purpose. Certainly an editorial of this nature has no news-worthy purpose. It is a sermon; it is whatever you want to call it. They are commenting, and commenting prejudicially, against this defendant. They are intimating that this man should not be permitted even to take an appeal on his convictions, because they say: “He has delayed another—” referring to a fine “—of \$200.00 by a notice of appeal.”

They say that a “*nolle prosequi*” is an unwillingness to prosecute. We know “*nolle prosequi*” is not an unwillingness to prosecute, but refusal to prosecute for some reason. It might be, and probably always has been, failure to have enough evidence to convict. In other words, throughout these cases, with the exception of the fine of \$10, has been unfavorable [113] comment about his ability to go through the proper and orderly processes of court to get a fair trial, and they think that because he is doing that, he is a bad character and that he is “putting one over” on the public, because he is trying to get a fair trial and trying to go through

on appeal on various matters which he has a legal and moral right to do.

So I say, if the Court pleases, at least beginning on August 10, 1949, we have an attempt made by the Advertiser to prejudice the people against this defendant, and it has had this effect; there can be no question about it.

We also have another editorial comment in Exhibit No. 7 of the same newspaper, Wednesday, September 28, 1949. Again they have done the same thing. They say that this man was arrested eight times on charges of seventeen violations of the law. Now, I submit, if the Court pleases, that is again an editorial comment which is not supported, not only by the proper evidence, but we also have a situation where they are commenting upon a situation which prospective jurors have absolutely no right to know anything about, prior arrests. They are not supposed to know that, and if he is convicted of a proper charge in this court, if he had been convicted of a proper charge, it could be used to impeach his credibility, but that is the only way prior convictions against a defendant can come in. Not only do they list prior convictions, they also say he has been arrested. So when a jury comes in to try this [114] man, even though no evidence is ever introduced as to prior convictions, they have from the newspaper articles full knowledge and awareness that this defendant has been arrested on many occasions and may have been convicted of many offenses, as a matter of fact, some of which should not ever have been permitted before them.

Finally we try the case on October 5, 1949, if the Court pleases, and the judge down in the district court acquitted the defendant, and the Star Bulletin of October 6, 1949, says: "Winston Churchill Henry Again 'Beats Rap.'" Now that is language, if the Court pleases, to my knowledge of the movies, leads me to suspect is language of the underworld, "beats the rap." I don't think that your Honor or Counsel or I, when we win a case, say we "beat the rap"; we say "the defendant was acquitted." I don't know whether Mr. Richards, who wrote this article—as a matter of fact, he said he didn't write the headline; he wrote the article, but didn't write the headline. It was the city editor, I think, who wrote the headline. I don't know whether the city editor was trying to be facetious or what his purpose was, but "Winston Churchill Henry Again 'Beats Rap!'" What does that lead the average layman to believe? That this man, Henry, a vicious criminal of the underworld of Honolulu, has again pulled some shenanigans whereby he has been acquitted of one case.

Now, I don't know when the previous time was that he [115] "beat the rap," but the editor here saw fit to say he "again beats the rap."

Now, as a matter of fact, if these articles that were in the newspaper—and I will admit there were a lot of them, and I haven't brought one-third of them in because I have felt some of them are ordinary comments on pending cases; for instance, if a case takes five or six days to try, newspapers re-

port, and some of them have been very conservative. They have said that so many witnesses have testified today and the case will go on tomorrow, or the case has been continued. But I have picked out the few that I have been able to get, if the Court pleases, where I believe that they can have no effect except to inflame people against Mr. Henry.

This one of July 21, if the Court pleases, in the Bulletin, which is Defendant's Exhibit No. 3, "Little Harlem's Boss Arrested." Well, who gave him that appellation, if the Court pleases? The newspapers did. They say he is the boss of Little Harlem. There is no evidence of that except that this defendant is just one of a number of colored people who live on Smith Street, no evidence whatsoever that he is the boss, that he is the leader of the underworld, if the Court pleases. That certainly can have no effect except to prejudice people against him. As a matter of fact, it got so bad that even people wrote to the editor. Here is one by Peter P. Shaw, as a matter of fact, although it is not in evidence because I couldn't [116] find it; but I know there was at least one other written statement before this.

It says:

"Surely he must realize that he is wasting his time since one Winston Churchill Henry has been arrested several times this year. He has been in a barricaded place along with his guests or clients, liquor served from a well stocked bar has been found, evidences of gambling and not

only two little marijuana cigarettes have been found in Henry's house, but large quantities of drugs, some of them buried in the garden.

"This man Henry does not belong here but is from the Mainland and still at large.

"Once more I ask who and what is behind Henry?"

If the Court pleases, here is one man—perhaps if I were able to find Peter B. Shaw I would like to bring him in—Here is a man who writes to the editor, and certainly there is a good man to pick on the jury. Where does he get all this information if not from the items in the newspaper? Why is he so incensed, if the Court pleases, if not from articles that have been written in the newspapers about this man calling him the "Boss of Little Harlem," or, as in Defendant's Exhibit No. 2, "one of Honolulu's better known underworld characters." I don't even know whether we have an underworld in Honolulu, but the Star-Bulletin says he is a "better known underworld [117] character." There he is saying the guy is a criminal. As I understand it, the underworld is populated by criminals.

And there is the time when a case was nolle prossed against this defendant. Of course, it has created considerable publicity. Here the newspaper publishes a statement of the Chief of Police: " 'I'm quite concerned because I don't feel the court was fair in not granting the continuance. The defendant has been granted several continuances.' " The only purpose of that, of course, and the only effect of

that, is that people reading this article immediately say, "Well, this guy Henry—" I have heard remarks of that nature. Of course I can't testify to them and I am not going to, but that is the result of things like that.

The other day, November 8, 1949, the defendant and some others pleaded *nolo contendere* to charges of being in a barricaded place and were fined \$25, which the Court, in its judgment, thought was a fair and reasonable fine and punishment under the circumstances. And what do we find? We have approximately an inch headline "Henry Gets Off Again For \$25." Is that a fair comment?

Then we have, of course, if the Court pleases, the article that was in Wednesday, September 21, in the Bulletin, which is Exhibit No. 1. That listed his so-called record, the record which, if the Court pleases, comes from the Police Department, and which, the Court may take judicial knowledge of the fact, [118] I as defense counsel for this defendant am not entitled to get hold of. So the only way I know of the police record is what I read in the newspaper. But the police give it willingly and voluntarily to the newspaper reporters, because they know that the newspaper reporters are going to write an article about this thing. And what do we have?

The Court: You didn't establish that in your evidence. You skimmed over that in questioning the witness as to where the newspaper man got the man's record.

Mr. Landau: I thought he said he got it from the police department. I may have been mistaken.

The Court: I think he said he went into the records division and got it.

Mr. Landau: That's right.

The Court: But as to what right he had didn't appear.

Mr. Landau: Well, I think your Honor can take judicial knowledge that the newspaper reporter is not going into the records division and get a man's record without the police department's consent.

The Court: I don't know.

Mr. Landau: Well, anyway, here is what they say about his record:

"August 25, 1947—Arrested for soliciting. He pleaded not guilty and was committed to circuit court [119] where the case was thrown out for lack of evidence."

Well, now, in the first place, that is not a conviction. Had he been convicted of that offense that particular conviction might be able to be used to impeach his credibility. But here there was no conviction whatsoever, merely an arrest.

"January 3, 1948—Charged with profanity and given a 13 months' suspended sentence which he appealed. On the appeal he was fined \$10 in the first circuit court.

"May 3, 1948—Charged with loitering and committed to circuit court where he demanded a jury trial and pleaded not guilty. The case was thrown out in the first circuit court.

“July 17, 1948—Arrested for spitting on the sidewalk. He forfeited a \$10 bail.

“August 28, 1948—Charged with assault and battery on a police officer. He pleaded not guilty, demanded a jury trial and was committed to circuit court. He was found guilty and sentenced to 60 days in jail, suspended for 13 months and fined \$200.”

They don't say that that case was appealed and is on its way up to the Supreme Court of the Territory.

“August 28, 1948—Charged with possessing unregistered firearm. Pleded not guilty, demanded jury trial and committed to circuit court. The case was remanded to district court where it is still pending.

“On the same date he was charged with illegally acquiring [120] a firearm. That case, too, is still pending in district court.”

It is a case not even tried yet.

“July 16, 1949—Possession of a machine gun and violation of firearms regulations. Still pending in district court.

“July 21, 1949—Charged with being in a barricaded place and permitting gambling in his home. Still pending in district court.

“Record on Mainland.

“Following is Henry's Mainland record—at least, what police and federal authorities know of it:

“August 1, 1934—Charged with petty theft in El Centro, Calif. He was sentenced to 50 days in jail.

“March 31, 1939—Charged with a traffic violation in El Centro and fined \$50.

“September 13, 1945—Charged with disorderly conduct in Juneau, Alaska, and fined \$100.

“Several other arrests for various offenses committed on the Mainland are on record here.

“Dispositions of these cases have not been received.”

What have they done, if the Court pleases, in this article? They have given the general public, and certainly prospective jurors in this case, a list of cases which he was never tried on, some which are convictions which could not be [121] used in this court to impeach his credibility, some cases which at that time had not even been heard by the court; and then they go on to say: “Following is Henry’s Mainland record—at least, what police and federal authorities know of it:” Inferring there is a whole lot more, but the police and federal officers don’t know it.

And then: “Several other arrests for various offenses committed on the Mainland are on record here.”

I submit I fail to see how the general public in this community could fail to be definitely influenced against this defendant as a result of these articles, and I submit, although it can’t be specifically tied, that these articles were the cause for all the remarks that have been made. I think it is perfectly logical to assume that these articles in the newspapers were the ones that caused people to start

talking. And there is a wide sentiment in this community, if the Court pleases, which believes what the newspapers say and believes in the Texas form of justice.

Now, a peculiar situation arose, which the Court may have seen, in yesterday's newspaper with reference to the Lewis assault and battery case.

The Court: Reference to what?

Mr. Landau: The Lewis assault and battery. Mr. Lewis was charged in the Territorial courts——

The Court: Who is he? [122]

Mr. Landau: He is supposed to have beaten up this woman over this week-end.

The Court: Oh.

Mr. Landau: And a reporter apparently asked Mr. Hite whether he was going to prosecute him, and Mr. Hite, as quoted in the paper, said——

Mr. Hoddick: Excuse me, Mr. Landau, I don't see how that has any relevancy.

Mr. Landau: It is just a story to indicate how people believe what is stated in the newspapers. If I may be permitted——

The Court: Go ahead.

Mr. Landau: He said something along this line: What I read in the newspaper and what the police have, there is enough evidence to convict.

I cite that, if the Court please, to show that even the prosecutor reads and believes what the newspapers publish about cases; so that if a prosecutor believes that, certainly the general public would be equally subject to newspaper reports. As Mr. Mc-

Graw said on the stand, Will Rogers once said all he knows is what he reads in the newspaper, and I think that is pretty true of what everybody in the community feels. The newspaper articles are thoroughly perused by everybody from page to page. They are subject to comment, as they were in this case, and they are unfavorable; they are [123] intended to be unfavorable. Whether that was the purpose, I don't know, but they certainly resulted in arousing considerable prejudice against this defendant, and when I stand before your Honor and say that in my opinion, from the evidence that has gone in, this man should be given the opportunity of being tried by a jury which will have absolutely no prejudices whatsoever, I know that your Honor is not going to be influenced by my statements, but I do want your Honor to be influenced at least by my sincerity.

Mr. Hoddick: May it please the Court, the thing that astounds me about this entire proceeding is the basic attack which Mr. Landau makes on our jury system. He knows and you know and I know that no jury is ever selected from a vacuum. We can't go out to the Himalaya Mountains and find twelve people who have never heard of a defendant who has received considerable publicity and who therefore have no previous information as to the cases which are prepared against him. However, when a juror is sworn into the box as a juror and he takes the oath that he will obey the instructions of the Court, we are provided safeguards. The Court in-

structs the jury that they will only find their verdict on the evidence which is adduced in the court room, and on their oaths they have said that that is what the basis for their verdict will be. If all the cases that have been publicized in the newspapers had to be removed to another venue, we would have the [124] witnesses traveling from one district to another district all over the country. You would hardly be able to try a case out here in Hawaii; you would have to take them all back to the Mainland. Certainly it is anticipated that the community as a whole will receive some advance information about a case or about a particular defendant, and the newspaper articles may be favorable or they may be unfavorable, but the basic presumption of our system is that if those men, on their oath, go into the jury box stating that they will act fairly and impartially, that is what is going to happen. If you are just going to discard that presumption, you might as well discard the whole jury system. Maybe we should arrange for an importation of people from Asia or Africa to try each case.

He says that these articles can have no effect except to inflame the people. The articles which he has introduced in evidence certainly are not favorable to Mr. Henry, at least most of them are not; but if they don't state facts, Mr. Henry has recourse. If they do state facts, they are something any newspaper is privileged to publish.

And then we again have to find out whether the jurors, as they are selected, will be able to act fairly

and impartially; and in that regard, I think this motion, this hearing, and all the evidence introduced are entirely speculative. I don't think your Honor knows now, any better than he did before the proceedings started, as to whether from the panel which has [125] been drawn a jury of twelve men tried and true could try Mr. Henry fairly and impartially.

We have been given an indirect insight into small segments of the community. There is no showing that it is representative of the whole. There is no showing that it is representative of what the state of mind concerning Henry is in the community to-day, and there is certainly no showing that it is representative of what the state of mind in the community will be at the date when the jury is called.

I think that the disposition which they made of the Eisler case of a similar motion is most proper.

"The effect of such published articles or the Executive Order referred to in the motion upon anyone called to serve as a juror in this case is only speculative and cannot be dealt with until an examination of those called for service as jurors reveals whether or not a jury can be secured, no member of which is or is likely to be influenced thereby. For these reasons, the motion for transfer upon the first ground is denied without prejudice to a renewal of the motion on this ground at the trial, if and when it appears that a fair and impartial jury cannot be secured."

In *Corpus Juris*, Vol. 22, page 313: "The exami-

nation of jurors on their voir dire has been said to be the best test as to whether local prejudice exists.”

This hearing has been restricted to the introduction of evidence which will tend to show generally whether there is prejudice in the community or is not prejudice in the community against Henry, but the whole theory of law that underlies such a showing as a basis for the transfer of the case is that if there is such a showing of such widespread prejudice, it will not be possible to select a fair and impartial jury.

Now, some of the defendant's witnesses, at least Miss Noonan, indicated that all the persons with whom she discussed this matter were not inflamed against the defendant, that they did not all think he should be sent out of the country without a trial. In fact, there seemed to be some dispute amongst those who discussed Henry as to whether that should be done or whether he should be given a fair trial. I suspect the conversations probably resulted when the furor occurred in the paper following the refusal of the judge to grant a continuance.

The Court: How about your witness Mr. Lansing. He said 50 per cent believe him guilty and 50 per cent believe him not as guilty——

Mr. Hoddick: However, he went on to say, I believe, that it was his opinion that the 50 per cent who believed him not as guilty were not people who had, I believe, pre-judged his guilt, or something on that order.

I don't think there is any question that there are people [127] in this community who are prejudiced;

I will admit it, but I don't think that that prejudice is so widespread, nor has it been shown that it is a prejudice which would prevent the defendant from being able to draw a jury who could try him fairly and impartially; and I don't think that has been shown to the Court.

The cases have repeatedly held that newspaper articles prejudicial newspaper articles, are insufficient as a basis for granting a motion for a change of venue; and on that score you have *Shockley vs. U. S.*, 166 Fed. (2d.) 704; *Allen vs. U. S.*, 4 Fed. (2d) 699; cert. denied by the U. S. Supreme Court.

In the *Lias* case, 51 Fed. (2d) 215, Fourth Circuit, 1931, cert. denied by the Supreme Court 284 U. S. 604, they found that the refusal to grant a motion for a change of venue did not constitute error. They repeated the old rule of law that this is entirely a matter which rests within the discretion of the trial court, trial judge, and in that case they delayed a finding until the jurors were examined on their *voir dire*.

I think in every community there is bound to be certain ideas as to the guilt or innocence of a particular defendant whenever that defendant has received widespread newspaper publicity. That is just a fact, something you can almost take judicial notice of. The essential question is whether from that community, and despite those articles, you are going to [128] be able to find a jury who can give that man a fair trial.

I submit that the motion for a change of venue

in each of these two cases should not be granted. Aside from the fact that it is my opinion, for what it is worth, and even from listening to the testimony adduced here, that a fair and impartial jury can be drawn, the Court should consider in exercising its discretion, your Honor, whether the showing is so clear that the Government should be put to the expense which would necessarily result if these cases were to be transferred. Under the statutes jurisdiction is vested in the district court located in the district where the offense took place. It is the primary responsibility of this Court to hear this case, unless you are convinced by what you consider a perfectly clear showing that it would be impossible to obtain a fair trial here, and I do not feel that any such showing has been made.

Mr. Landau: If the Court pleases, we admit, and have never stated otherwise, it is a discretion of the Court; it is not a matter of right. We also must admit, and we have never contended otherwise, that the community is not 100 per cent inflamed against Henry. We know there are some right thinking citizens in the community who will not pass judgment upon him until after the trial; but our difficulty is going to be in finding them, if the Court pleases.

It is a rather peculiar position for me to be in, living [129] in this community and liking to live in this community, and trying to announce to the Court that there isn't a right-thinking man in here except me. If the Court pleases, I defy Counsel, or any-

body in this community, to give me one example of any one individual, with the possible exception of the Massie case, that has excited so much editorial comment about one individual charged with an offense. Certainly in the years that I have been here, about the same length of time as your Honor, I don't remember one single instance of so much of this type of stuff appearing in any one case; and I say that, if the Court pleases, knowing full well that prior to my service I was employed, engaged, and associated with one Mr. Patterson, who has had a large number of criminal cases, some of them of considerable widespread importance; and not one of them has received the comment that this one has.

Now, if we were to believe Counsel as to the innocuous effect of any of these newspaper articles, I wonder how he can explain away the fact that when a jury has a case, or while they are listening to a case, they are instructed, not asked, instructed not to read newspaper articles concerning the case, and that when they are deliberating on the case, they are told directly that they must not read anything about the pending case. Why? Because the judge is a mean old "son-of-a-gun," or because he does not want them to read anything that might influence them in their judgment? So we have more than a little [130] precedent for the fact that the judges and the courts are aware that newspapers can and do influence people, and if that were not the case, would there ever be a situation where editors were found guilty of contempt of court for publishing

articles and commenting upon certain cases before they had been disposed of? Now, if the Court please, as a matter of law I think it is a question for the prosecutor in his capacity as prosecutor to ascertain whether or not some of these articles are not, in fact, in contempt of your Honor's court because they are commenting and because they are permitting things to get to prospective jurors which should not be permitted.

The Court: Have you read the most recent decisions of the United States Supreme Court on the subject of contempt?

Mr. Landau: Actually, I have not, your Honor. I am just suggesting that as a possibility, not arguing the particular point.

The Court: The old-fashioned law that you and I have in mind, I doubt seriously, in the light of those decisions, whether it still pertains. There seems to be greater emphasis today to restrict the courts and enlarge the scope of free public press.

Mr. Landau: That is limited, if the Court please, to newspaper articles, but not editorial comment.

The Court: I am not prepared to decide. [131]

Mr. Landau: That would be my suggestion in answer. I am not prepared either.

The Court: But just generally speaking, the Supreme Court has whittled down the powers of the court. However, I have recently had an editor of a newspaper, or we have, up to see us on the basis of certain photographs; but that is neither here nor there.

Mr. Landau: Now, Counsel in his discussion said there is no showing what the temper of the people is today or what it will be at the time of the trial. I suppose what he intends that we have to prove is that not only have they been prejudiced yesterday, but that they are prejudiced today and will continue to be prejudiced tomorrow. Now we know very well human emotions just don't turn off and on like water in a faucet. They are prejudiced and their prejudice remains, and I think it is a good presumption that once an existence of a fact is shown, it is presumed it will continue to exist.

The Court: Shouldn't we also consider in this the fundamental, underlying fairness of the American public and the fact that they dislike to see a person taken unfair advantage of?

Mr. Landau: That is fine for the other person, but not when it comes to them. I mean, the American public has that feeling; they don't like to see the underdog kicked; but it applies to the other fellow and not to me. That is the [132] general idea. I am just as aware of that as your Honor.

The Court: I think you are wrong.

Mr. Landau: That may be the general feeling, that is true. I like to think, at any rate, that we as American citizens want to see everybody get a fair "break," but if that were the situation, if the Court pleases, then you would never have a question about changing of venue because of prejudice. I mean, the people who drew up our rules of criminal procedure would have said, "We don't have to

worry about change of venue for prejudice because it doesn't exist." It does exist in spite of what we like to think about it, if the Court pleases. We certainly know that the term Southern or Texas justice is not something that has no basis in fact. We do know that we have had vigilantes where people were executed without being given a trial. We do know that the saying, "Let's give him a fair trial and hang him right away," has some existence in fact. It isn't just a figment of the imagination. So we do know people become inflamed and prejudiced, if the Court pleases, that it overcomes their basic love for fair play; and Mr. Lansing was an example, if the Court pleases. I was amazed at his answer and amazed at the vehemence with which he made that statement. And that is true, I think, of too many people in our community at the moment. I am afraid as long as Winston Churchill Henry is going to have to be tried by a jury in this community, with [133] the feeling that has been expressed by these witnesses, that it is going to be difficult to ascertain what the true situation is going to be in the jury's mind.

We don't have to show, if the Court pleases, that we cannot get twelve or even twenty-four or even thirty-six men in this community who would not give him a fair trial. I don't think that is the test. I think the test is: Is there sufficient prejudice so that he might not get a fair trial? Anything is possible, sure. It is very possible that he might get twelve men that will sit on the jury and give him a

fair trial, but it is not the question of whether it is impossible to get a fair trial. The likelihood of his getting a fair trial is such that to require him to go to trial in this matter would in effect result in his being convicted by the jury without the first witness going on the stand. And I submit, if the Court pleases, that if we had people who had the courage of their convictions who, if they had a prejudice, would take the stand on questioning on voir dire and say, "Yes, I am prejudiced," that would be one thing. But we know we don't have too many people with the courage of their convictions, as indicated by Mr. McGraw when he said he was amazed at the small number of white people who were willing to come up and have their names involved in this case. And that has been the situation all the way through. People are unwilling to be connected in any way, no matter how remote, [134] with Winston Churchill Henry for fear that the publicity which they will get will not do them any good, but will, in effect, harm them in their business or in their social activities.

If we have that, if the Court pleases, if we have that feeling in the community, I submit that is evidence of itself of the prejudice of people in the community and indicates quite clearly that these people who admit prejudice and refuse to testify because they don't want to get their names involved have done the defendant more service than they have anticipated, because it clearly indicates that these people, who are not criminals in and of them-

selves, are afraid and fear that the rest of the community will look down on them because they may have had the courage of their convictions to come up and tell your Honor what they believe as to whether or not this man could or could not get a fair trial.

I submit, if the Court pleases, in view of all the circumstances, and since it is discretionary, your Honor has got to say to himself, "In my conscience and in my heart, if I were to be tried in this community, if I were sitting in the other fellow's shoes and I were being tried under the spirit and temper and prejudice of the people, of which there can be no question there is prejudice, would I feel that I was getting a fair trial if I went to trial under those circumstances?" And if your Honor can say to himself under those circumstances that you would get a fair trial, then I [135] say to your Honor, "You deny this motion." But if, on the other hand, there is any doubt in your mind that such a fair trial could be obtained, then I believe that your Honor should grant this motion.

The Court: Well, I have heard the evidence and the arguments. I would say the argument was a lot better on both sides than the evidence on either side. On the basis of the Eisler case I am going to deny the motion without prejudice to the right to renew the same.

Mr. Landau: I take an exception to your Honor's ruling.

The Court: All right. Now where does this leave the matter? Ready for setting?

Mr. Hoddick: I think it will have to be set down for trial, your Honor.

The Court: All right. December 5.

Mr. Landau: I sincerely believe, if the Court pleases, that there should be a considerable length of time elapse between this hearing and the date set for trial, for the reason that I think that the public's attention and focus should be away from this case for a little while so that things can smooth down and quiet down and thus get into a situation, if the Court pleases, where we have more likelihood of getting a fairer jury. I earnestly request that of the Court.

The Court: You mean you aren't going to examine [136] the jurors on voir dire?

Mr. Landau: Oh, yes, I am going to examine them on voir dire, but I know human beings and I think, if the Court pleases, that in fairness to this defendant there should be a longer lapse of time before the trial of this case.

The Court: I can't see that. What is the calendar for December 5?

Mr. Landau: If the Court pleases, on that day I would like to inform the Court I have two cases set for another court, and on the 7th I start a jury case, which was set by his Honor Judge Parks today, and which, unfortunately, concerns the same defendant.

The Court: Well, you have two other attorneys with you, one of whom is temporarily ill.

Mr. Landau: Well, Mr. Fairbanks will not be

back at that time. I know definitely he won't be back on duty even on a partial basis until about the 15th of December. He was operated on Monday and he will be in the hospital for ten days and will be out of work for four to five weeks after that.

The Court: Well, today is November 9, or 10?

Mr. Hoddick: Tenth.

The Court: What is your thought?

Mr. Hoddick: Pardon me, your Honor?

The Court: What is your thought as to the date? [137]

Mr. Hoddick: Any time shortly before Christmas.

The Court: That is a bad time, shortly before Christmas.

Mr. Hoddick: Or shortly after New Years. I think the week of December 1 to December 7—in fact, from November 25 until December 7 I have cases scheduled for trial with this division and the other one.

The Court: How long is it going to take to try these cases? There are two separate cases.

Mr. Landau: There are two separate cases, if the Court pleases.

The Court: Which one comes on first?

Mr. Landau: I venture to state that each of these cases is going to be lengthy. I say this because of the fact that offshoots of these cases have been tried in another court and they have taken at least six sessions, each one of them, of approximately three hours each. We will have the problem of

picking juries. I can assure the Court it is going to be a long, long time on that matter.

The Court: December 5, nine o'clock.

Mr. Landau: Well, there are a lot of preliminary matters in this case which must be issued first.

The Court: Let's get them lined up and handle them.

Mr. Landau: I will try to get them to your Honor as quickly as possible. [138]

The Court: Motions?

Mr. Landau: Motions, yes, your Honor.

The Court: Well, I will tell you what I will do. Instead of December 5 I will make it January 3, with the understanding that between now and then you file any and all motions and move them on for disposition before January 3, because that is going to be the trial date, if a trial is required.

Mr. Landau: Yes, your Honor.

Mr. Hoddick: May it please the Court, we have, as you know, two cases.

The Court: The first one, January 3, related to what? The one that comes first by number.

The Clerk: That is the one that involves narcotics.

Mr. Hoddick: Henry is the sole defendant named in the indictment.

The Court: Is that clear?

Mr. Landau: Yes, your Honor.

The Court: In other words, after January 3 I am not going to hold up the proceedings any more for motions.

Mr. Landau: If I haven't filed them by then, I will not file them at all.

The Court: All right.

(Thereupon, at 4:50, the hearing in the above-entitled matter was adjourned.) [139]

REPORTERS' CERTIFICATE

We, the Official Court Reporters of the U. S. District Court, Honolulu, T. H., do hereby certify as follows:

That the foregoing is a true and correct transcript of proceedings in Criminal No. 10,253, United States of America, Plaintiff, vs. Winston Churchill Henry, Defendant, held in the above-named court on November 1, 9, and 10, before the Hon. J. Frank McLaughlin, Judge, and a Jury.

/s/ ALBERT GRAIN,

/s/ LUCILLE HALLAM.

March 15, 1950.

[Endorsed]: Filed April 20, 1950 U.S.D.C.

[Endorsed]: Filed May 1, 1950 U.S.C.A. [140]

In the United States District Court for the
Territory of Hawaii
Criminal No. 10,253

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WINSTON CHURCHILL HENRY,
Defendant.

Before: Hon. J. Frank McLaughlin,
Judge, and a Jury.

Appearances:

HOWARD K. HODDICK, ESQ.,
Assistant U. S. Attorney,
Appearing for Plaintiff;

NAT RICHARDSON, ESQ.,
Assistant U. S. Attorney,
Appearing for Plaintiff;

O. P. SOARES, ESQ.,
Appearing for Defendant;

SAMUEL LANDAU, ESQ.,
Appearing for Defendant;

WILLIAM Z. FAIRBANKS, ESQ.,
Appearing for Defendant.

PROCEEDINGS

(The Court convened at 10:10 a.m.)

(A jury was impanelled and sworn to try the case.)

The Court: Now, gentlemen, I am going to tell you for the first time and I will without doubt tell you several times throughout the course of this trial that you are not to discuss this case, or any phase of it, with anyone, including your wife or members of your family or with fellow jurors. You are not to discuss this case at all. The only time when you will be at liberty to do so is when the case is submitted to you for decision and you retire to your jury room and start deliberations. In the meantime I want you to refrain, as I have said, not only from discussing this case with anyone but also to refrain from reading whatever may be printed in various publications concerning the trial of this case. You won't miss anything. You will be here at the ringside and you will know everything that goes on, so there is no need of your feeling that you will miss anything by reading or omitting to read in the press whatever may be printed there.

And similarly I would suggest that you refrain from listening to whatever may be said concerning the trial of this case if it is said by anyone on the radio. In other words, you must keep throughout this trial the same frame of mind that you have now, as you started, and take every precau-

tion to assure that during the trial you are in no way prejudiced. And for that reason I am being abundantly cautious in having you refrain from reading the newspaper articles on this case. You can still read the sports page and the general headlines, of course, or listen to the radio commentators, and what not.

I meant to discuss with Counsel before I dismiss the other jurors whether or not they feel the need for alternate jurors.

Mr. Soares: From our standpoint I see no need for it.

Mr. Hoddick: I don't think so, your Honor.

The Court: You are all feeling well? All right. We will proceed with 12. Very well. Is there anything else that needs to be attended to at this time?

The Clerk: I don't think so.

Mr. Hoddick: After the Jury has been excused I would like to make a motion which I think can be disposed of in about five minutes, and we will be ready to proceed without delay in the morning.

The Court: All right. The Jury may at this time be excused and I will find out what it is you have to say. Until tomorrow morning at ten o'clock you are excused under the instructions.

(Jury excused at 3:20 p.m.) [2*]

(Motion made by Mr. Hoddick to amend the first count of the indictment. Argument by Counsel. Mr. Hoddick withdraws motion.)

(The Court adjourned at 3:30 p.m.) [3]

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

January 5, 1950

(The Court convened at 10:10 a.m.)

The Clerk: Criminal No. 10,253, United States of America versus Winston Churchill Henry; case called for trial.

Mr. Hoddick: Ready for the Plaintiff, your Honor.

Mr. Landau: Ready for the Defendant. If the Court please, may we ask that the witnesses be put under the rule of exclusion, during the testimony and during the argument and opening statement?

Mr. Hoddick: May I ask for the customary exception as concerns Mr. Wells?

The Court: The rule itself includes the exception. Very well. Before we start upon the trial of this case, I will put all witnesses on both sides under the rule, which means that anyone who is to be a witness in this case is excluded from the courtroom until called on the witness stand, with the exception to the limit of one for each side. Each side may have one person who may be a witness to remain with Counsel during the trial.

Mr. Landau: I object to that, if the Court please. This rule is invoked for a particular purpose. There is no reason for any exception. The Defendant has the right and he is a party to this case and should be here. But for the government to have any witnesses, no matter who they are, is [3-a] a highly improper view. We ask that the rule be invoked.

The Court: The rule, Mr. Landau, includes the exception. There will be no change in the ruling. It has been thus for years.

Mr. Landau: May we have an exception?

The Court: You may have an exception. Very well. The parties are ready to proceed. The Jury is present. The Defendant is present together with his attorneys. Gentlemen of the Jury, we are about to engage on a trial under an indictment which contains two counts, each of which the government undertakes to prove to your satisfaction beyond all reasonable doubt.

The Defendant engages upon this trial surrounded by a presumption of innocence, which is a presumption of real substance which abides with him throughout the trial until during your deliberations, if you are satisfied beyond a reasonable doubt, that the government has proven the charge in each particular, in the counts named in this indictment.

Count one of this indictment charges that on or about the 16th day of July, 1949——

“That on or about the 16th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Winston Churchill Henry, alias ‘Frisco Shorty,’ did knowingly, wilfully, unlawfully and feloniously purchase a salt, compound and derivative of [4] opium, to wit, 946 capsules, each containing heroin, and a derivative of coca leaves, to wit, 250 grains of cocaine, which heroin and cocaine was not then and there in the original stamped package and was

not from the original stamped package, in violation of Section 2553(a), Title 26, United States Code."

The second count of the indictment alleges——

"That on or about the 16th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Winston Churchill Henry, alias 'Frisco Shorty,' the identical person named in Count I of this Indictment, being then and there a transferee required to pay the transfer tax imposed by Section 2590(a), Title 26, United States Code, did knowingly, wilfully, unlawfully and feloniously acquire and otherwise obtain a quantity of marihuana, to wit, 787 grains of bulk marihuana and 35 marihuana cigarettes without having paid such tax in violation of Section 2593, Title 26, United States Code."

At this time the government may make its opening statement if it desires to so do.

Mr. Hoddick: May it please the Court, and gentlemen of the Jury, the Court has just read to you the indictment which was returned by the Grand Jury, and those are the facts which we shall endeavor to prove and which we believe we can prove to your satisfaction and beyond a reasonable doubt. [5]

During the trial of this case the government is not going to introduce any witnesses who will testify that they sold heroin or cocaine to the Defendant, nor will it introduce any witnesses who will testify that they transferred to the Defendant marihuana.

We intend to prove that at this lodging at 803 Hausten Street there were two houses, one in the front and one in the rear, the one in the rear being separated from the one in the front by a sort of dividing ditch over which there was a bridge; that the Defendant, Winston Churchill Henry, lived in that house in the rear; that found under a flag stone made of concrete, concrete paving stone, in the rear of that house and in the rear of 803 Hausten Street, which is surrounded by a fairly high tile wall, were found an Ovaltine box in which there were 915 capsules each of which contained heroin; that under the pillow on a sun couch in the patio in the rear of this house, in the rear of 803 Hausten Street, was found a bottle containing 250 grains of cocaine; that between the canvassed blinds and the screen, I think, in this same house where the Defendant lived, there was found a package, a brown paper bag containing 787 grains of bulk marihuana; that under the other canvass curtain or sort of drape awning that hung there was found a small box in which there were 29 marihuana cigarettes; and that in the house itself, under a cushion on the settee or under the [6] cushions there were found six marihuana cigarettes.

The Court will later instruct you that if we have convinced you—and I am certain that we shall—that the Defendant had these drugs in his possession, that they were under his dominion and under his control, that there arises from that presumption, from that possession a presumption that the De-

defendant unlawfully purchased those drugs, that is, the heroin and the cocaine, and that he unlawfully acquired the marihuana. Congress has enacted this statute providing fairly——

Mr. Soares: I don't like to interrupt Counsel, but this is not a statement of what Counsel expects to prove.

The Court: That is right.

Mr. Soares: He is attempting to tell the Jury what the law is, which is strictly the function of the Court.

Mr. Hoddick: We will prove to you that the Defendant had these drugs in his possession; that they did not bear the requisite tax-paying stamps. And then under the law it will be up to the Defendant to show, if we prove that to you beyond all reasonable doubt——

Mr. Landau: I object, I object to that. We are again arguing the question of the law, and it is not right for Counsel in his opening address to state that we have any burden of going forward, of proving anything.

The Court: I will make the law clear to the Jury at the [7] appropriate time. You simply state what you are required to prove.

Mr. Hoddick: In other words, your Honor and gentlemen of the Jury, we will prove the possession of these drugs; that these drugs did not bear the appropriate tax-paying, taxpaid stamps. And that will be the government's case. And that all of this took place within the City and County of Honolulu, Territory of Hawaii.

The Court: Mr. Kramer, do you wish to ask a question?

Juror Kramer: I'd like to ask him the location of his flag stone. The location of the two houses is confusing. Is the flag stone between them or behind the rear house?

The Court: You wait until you hear the evidence.

Juror Kramer: Thank you.

The Court: And I might caution you now, and this remains true throughout the trial, that the evidence upon which you will found your verdict will come to you from the witnesses who testify or from the documents that may be introduced into evidence, and that statements of Counsel are not evidence until they are in the form of a stipulation or agreement of facts, in which event it will be abundantly clear that that may be accepted as evidence. But Mr. Hoddick's opening statement is simply an outline of what he intends to prove beyond a reasonable doubt. What he has said is not evidence.

Does the defense at this time wish to make its opening [8] statement?

Mr. Landau: We wish to reserve our opening statement.

The Court: Very well. Now, let this also be understood throughout and let's start off by clearing it up right now: Who is going to be in charge of this trial for the defense?

Mr. Soares: Mr. Landau is senior counsel, if

the Court please. I am merely an associate. However, we will probably alternate in the cross-examination and examination of witnesses.

The Court: There will only be one allowed at a time.

Mr. Soares: I understand that to be the rule. And while I am on my feet I ask the Court's permission to leave at the eleven o'clock recess because I have an appointment with my doctor which will keep me there this morning and part of this afternoon.

The Court: Yes. You may have the same freedom that Mr. Fairbanks has.

Mr. Soares: Thank you.

The Court: Without any further comment thereon. And the same applies to the government. Only one counsel at a time. Very well. You may call your first witness.

Mr. Hoddick: Sergeant Richard Sasaki.

RICHARD SASAKI

a witness in behalf of the Plaintiff, being duly sworn, testified as follows: [9]

Direct Examination

The Court: Will you please state your name, age, residence, occupation and citizenship?

The Witness: My name is Richard Sasaki.

The Court: Age?

The Witness: 32 years.

The Court: You live here in Honolulu?

(Testimony of Richard Sasaki.)

The Witness: Yes, sir.

The Court: You are obviously connected with the Honolulu Police Department.

The Witness: Yes, sir.

The Court: And in what capacity?

The Witness: Motor patrolman.

The Court: And you are a citizen of the United States?

The Witness: Yes, your Honor.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.

Q. (By Mr. Hoddick): Sergeant Sasaki, how long have you been with the Honolulu Police Department? A. A little over nine years.

Q. And in July of 1949 in what branch of the Honolulu Police Department were you serving?

A. Vice division, gambling detail. [10]

Q. How long have you served in the vice division at that time? A. Served about two months.

Q. Do you know the Defendant, Winston Churchill Henry? A. Yes, sir.

Q. Will you point him out for the Court and Jury?

A. He is in the back of Mr. Soares there, the maroon jacket.

Mr. Hoddick: May the record show that Mr. Sasaki has identified the Defendant?

The Court: Yes.

Q. Did you have occasion to see the Defendant at any time during the month of July?

(Testimony of Richard Sasaki.)

A. Yes, sir.

Q. And where did you see him?

A. Saw him at 803 Hausten Street.

Q. And what was that date?

A. July, about July 16th?

Q. 1949? A. 1949.

Q. And in what city and county is 803 Hausten Street? A. Hon.

Q. That is in the Territory of Hawaii?

A. Yes, sir.

Q. And for what purpose did you go to 803 Hausten [11] Street?

Mr. Soares: We object to that, if the Court please, the witness' undisclosed purpose is not evidence. Let him testify to the facts, what he did. The purpose will then be determined by the Court and Jury.

The Court: All right.

Q. (By Mr. Hoddick): With whom did you go to 803 Hausten Street?

A. I went there with Mr. Wells, U. S. Narcotics, and Captain Whitford, Sergeant Kinney and Sergeant Sousa.

Mr. Landau: Sergeant who?

The Witness: Kinney.

Q. (By Mr. Hoddick): And where had you been immediately before going to 803 Hausten Street?

A. We started off, we met at the Police Station at about 8:15; we left in Mr. Wells' car and we went

(Testimony of Richard Sasaki.)

to the Drier Manor. Then Captain Whitford gave instructions to——

Mr. Soares: We object to any hearsay, if the Court please, or the result of any hearsay.

Q. (By Mr. Hoddick): Just tell what you did, Sergeant Sasaki?

A. After meeting there I went over with Mr. Wells to the service station on South Beretania Street and borrowed a friend's car. Then we returned back to the Drier Manor, [12] and Mr. Wells, Captain Whitford, Sergeant Kinney and Sergeant Sousa and I went on that borrowed car to a residence right next to 803 Hausten Street.

The Court: Excuse me. Who went with you on this borrowed car?

The Witness: Mr. Wells, Captain Whitford, Sergeant Kinney and Sergeant Sousa.

Q. About what time was this that you went to the residence next to 803 Hausten Street?

A. It was a little after nine, I believe.

Q. What happened after you got there?

A. Mr. Wells, Captain Whitford and I went to the apartment next to 803 on the mauka side. I believe it's 807 Hausten Street.

Q. Did you know the person who lived in that apartment?

A. I happen to know the lady living there and I asked her permission to go into her place to observe things that were going on at 803 Hausten Street. She gave us permission to go in there and

(Testimony of Richard Sasaki.)

we stayed there, and Sergeant Sousa and Sergeant Kinney were in the other half of that duplex apartment. Then we stayed there for quite a while. Maybe it was about two hours or two hours and one-half. And Charles Montgomery drove up in a black Packard sedan and parked it right in front of 803 Hausten Street on the sidewalk area.

Q. Sergeant Sasaki, would you describe the premises [13] of 803 Hausten Street?

A. There is a two-storey house in the front and there is another one in the back, two-storey affair. There is no driveway leading into the place. That's why Charles Montgomery parked his car in the sidewalk area there.

Q. Is there a sidewalk?

A. There is no sidewalk. It's grass.

Q. Is there any kind of enclosure around these two houses?

A. There is a tile wall about four to five feet high.

Q. Does that go completely around them?

A. Completely around.

Q. Does it go in the front, too?

A. I don't know whether it was in the front or not, but it was around the sides and back.

Q. Is there anything that separates the two houses on that lot?

A. Oh, there's quite a space in between and there's a small stream running across the property there. You have to cross a small little bridge or

(Testimony of Richard Sasaki.)

walkway, whatever you call it, to get to the other house.

Q. What happened after you had waited in these premises of 807 Hausten Street for two to two and one-half hours?

A. After Charles Montgomery got off the car he went to the rear house, the house in the back of 803 Hausten [14] Street. And in the meantime—I think her name was Dolores Allen—two girls came out and came out and walked mauka on Hausten Street. And after a short while, about ten minutes, they came back again. Then a short while later they went up again and came back with some clothing or some clean clothes. I believe it was wrapped up in paper or something like that. Then after they went into the back house, the rear house, they came out again on a bicycle and they rode off. They were riding around on Hausten Street. And then at about 12—it was shortly after 12:30—Mr. Wells was looking through the window and saw——

Mr. Soares: Just a minute.

Q. (By Mr. Hoddick): You testify, Sergeant, to what you saw, what you experienced.

A. Well, I was told by Mr. Wells——

Mr. Soares: We object to any hearsay, if the Court please, what Mr. Wells told him.

The Court: Only testify as to what you did, you saw, you heard yourself, not what somebody else——

(Testimony of Richard Sasaki.)

The Witness: I saw——

The Court: You wait. You answer the question.

Q. Sergeant Sasaki, did you go back to the house in the rear of 803 Hausten Street?

A. Yes, sir, after a while. [15]

Q. And with whom did you go back there?

A. I went back there with Mr. Wells, Mr. Henry, Captain Whitford, Sergeant Sousa and Sergeant Kinney.

Q. Did you see Mr. Henry before you went back to the house?

A. I saw him just walking out of, on the side of the front house, 803 Hausten Street, and going into his car.

Q. And what happened at that time?

A. Mr. Wells and Captain Whitford went out from that apartment we were in and I knocked on the wall to signal Sergeant Sousa and Sergeant Kinney to come out, and we were right behind Mr. Wells and Captain Whitford. And Mr. Wells went over to Mr. Henry—Mr. Henry was just about to get into the car.

Q. Into which car is this?

A. There was a black Packard sedan that Charles Montgomery drove up in. And Mr. Wells had a paper in his hand. I believe it was——

Mr. Soares: We object to what the witness' conclusions were, if the Court please.

The Court: Sustained.

Mr. Soares: And at this point—and I didn't

(Testimony of Richard Sasaki.)

have an opportunity, if the Court please—I'd like to move that the conclusion of the witness that Henry walked to his car be stricken as being a conclusion. [16]

The Court: You may cross-examine him on the point.

Mr. Soares: Save an exception.

Q. (By Mr. Hoddick): Did Mr. Wells hold this paper out to Mr. Henry?

A. He had a paper in his hand, and I was in the back of Mr. Wells, quite—I'd say about 10 feet or somewhere around there. So I didn't know, I couldn't hear what he was saying to Mr. Henry.

Q. Did you hear the Defendant say anything at that time?

A. He said something to Mr. Wells but I don't, I can't hear.

Q. Then you all went back to the house in the rear of 803 Hausten? A. Yes.

Q. And what happened after you got back there?

A. Mr. Henry called for somebody to open the door. And he told us to come in, and we all went into the house. And then Mr. Wells showed him the warrant and Mr. Henry said, well, he knows about the warrant, what a search warrant is like. And Mr. Wells didn't have to read out everything to him.

Q. And then what did he do?

A. Then Mr. Wells and I went upstairs and checked if anybody was up there. And Mrs. Helen

(Testimony of Richard Sasaki.)

Thomas was upstairs, [17] and I told her to come downstairs, she was wanted downstairs. And I stood by in the living room there with Charles Montgomery, Mrs. Helen Thomas, Dolores Allen and another little girl there. And Mr. Wells went upstairs, Sergeant Sousa and somebody else. I stood by there until Officer Marcotte or somebody came in——

Mr. Soares: What is the name of that officer?

The Witness: Marcotte, M-a-r-c-o-t-t-e. Marcotte came in.

A. (Continuing): Marcotte came in, and I told Marcotte to stand by in the living room.

Q. Well, Sergeant Sasaki, did you make any search of the premises?

A. After Marcotte came there, Mr. Wells came downstairs; I went outside in the back of the kitchen, through the kitchen door, and there's a little room there, and I went out there to search the grounds.

Q. And where did you search, in the back of the house?

A. In the back of the house on the mauka, Koko Head end.

Q. And where did you, what did you look under and at back there?

A. I checked, I looked under a pipe that was a laundry pipe to hang the laundry or something, that had wire; and I looked under the concrete there, and there was nothing there. [18] So I checked

(Testimony of Richard Sasaki.)

further. As I was walking makai in the back, in the back of the house, there were three concrete flag stones or something like that, and upon coming to the third flag stone I noticed a slight hole on the side of the flag stone and a little disturbance. So I lifted the slab up and there was a hole under the slab and a bottle, an Ovaltine bottle with some capsules in it.

Q. How big a hole was it?

A. Well, I cannot say exactly how big it was. I think it was about 8 to 10 inches deep and about——

Q. Did you take the Ovaltine bottle out of the hole?

A. Right then Officer Case came around the corner and he noticed me lifting up the slab, and I called his attention that something was in there. And he came over and he saw that bottle. And one of us, I believe it was——

Q. Did Mr. Wells come before you took it out?

Mr. Soares: I object to Counsel interrupting the witness in the middle of his testimony. Let's have his complete answer.

The Court: Had you finished your answer? (to Mr. Soares) You stand up when you address the Court.

Mr. Soares: Beg your pardon.

The Court: Had you finished your answer to the last question? You started to say something and Mr. Hoddick asked you another question. Had you finished your answer? [19]

(Testimony of Richard Sasaki.)

The Witness: I am continuing yet.

The Court: All right. Go ahead, finish your answer.

A. (Continuing): I believe Officer Case yelled out for Mr. Wells and Mr. Wells and Mr. Churchill there and several other vice men came down, came out of the house, and after showing them, Mr. Wells, the bottle there, I was advised to pick the bottle up on the top end of the cover, and I held on to the bottle and followed Mr. Wells and Mr. Churchill and Sergeant Sousa, I believe, upstairs to continue searching the mauka bedroom there. And while I was there I was in view of Mr. Churchill and had that bottle with me at all times. After searching——

Q. Excuse me. Why did you hold the bottle in that fashion?

Mr. Soares: We object to that, if the Court please, the witness' reason for doing any act. It is not evidence, if the Court please. It will be argumentative.

The Court: Overruled.

Mr. Soares: Save an exception.

The Court: Granted.

A. I held the bottle on top. The reason why I held it there is not to smear the bottle for later taking of prints, possible prints on the bottle.

Q. Now, when you found the bottle in this hole under the concrete paving stone, Sergeant Sasaki, did Mr. Henry [20] come out there before you took the bottle out of the ground or not?

(Testimony of Richard Sasaki.)

A. Mr. Henry and Mr. Wells and several others came out. I didn't touch the bottle until they all came there.

Q. And then you took the bottle upstairs?

A. Yes, sir.

Q. And what happened after that?

A. Searched—after waiting for Mr. Wells and several of the boys, who were searching the mauka bedroom, then after they got through we went to the makai bedroom. And I believe in the meantime Officer Case called out again that he had something. He found something. And we all went downstairs and there was a small little bottle, a clear bottle.

Mr. Soares: What kind of bottle?

The Witness: Small, clear. It is not white but it is clear. You can see right through that bottle. It had some white, something like salt in it.

Q. (By Mr. Hoddick): Sergeant Sasaki, did you ever turn the bottle that you found over to anybody else?

A. No, I didn't until I turned it over to Mr. Wells later on.

Q. And where did you do that?

A. That was in a small little room on the mauka side of the kitchen, adjoining the kitchen. [21]

Q. And what took place at the time you turned the bottle over to Mr. Wells?

A. Mr. Wells, in Mr. Churchill's presence, counted the capsules, the number of capsules in the bottle.

(Testimony of Richard Sasaki.)

Q. And how many were there?

A. There were 915 capsules.

Q. And then what was done with the capsules?

A. The capsules were put back in the bottle and I got the cover and covered it up. The capsules were put back and I believe we covered it or—I'm not sure of that, whether I covered it before Lieutenant Fraga came down to take the prints of the bottle.

Q. Was there any substance in these capsules?

A. There was; the capsules were filled.

Q. Did you put any identifying marks on this bottle?

A. After sealing it again, I put my initials on it, R.H.S.

Q. In your presence did anybody else put any identifying marks on the bottle?

A. I believe Officer Case, somebody there, put their initials on it.

(Mr. Wells opens a large envelope, extracts a bottle, and hands same to Mr. Hoddick.)

Mr. Hoddick: May I have this marked as the government's first exhibit for identification purposes? [22]

The Clerk: Government's Exhibit No. 1 for identification.

(The bottle referred to was marked "U. S. Exhibit 1 for Identification.")

Q. (By Mr. Hoddick): Showing you govern-

(Testimony of Richard Sasaki.)

ment's No. 1 for identification purposes, Sergeant Sasaki, can you identify it? A. Yes, sir.

Q. What is it?

A. This is the Ovaltine bottle that I found in the, with the 915 capsules that we counted and I initialed it in here, R.H.S.

Q. Your initials appear on government's Exhibit No. 1? A. Yes, sir.

Q. Where was that flag stone located with reference to the rear house at 803 Hausten Street?

A. That is, it was in the rear of that house on the Koko Head side of the house.

Q. How close to the house?

A. It's only a few feet away from that, from the wash house extending in the back of the rear house.

Q. Now, was there any change in the condition of government's Exhibit No. 1 from the time you found it until the time you gave it to Mr. Wells?

A. There was no change from the time——

Q. From the time you found it until you gave it to [23] Mr. Wells.

A. There was no change.

Mr. Hoddick: May I have this marked as government's Exhibit No. 2 for identification purposes? (Showing a photograph.)

The Court: It may be marked.

The Clerk: U. S. Exhibit No. 2 for identification.

(Testimony of Richard Sasaki.)

(The photograph referred to was marked
"U. S. Exhibit No. 2 for Identification.")

Q. (By Mr. Hoddick): Do you have a clear recollection of the place, Sergeant Sasaki, where you found this bottle? A. Yes, sir.

(Mr. Hoddick shows photograph to Messrs. Soares and Landau.)

Q. Showing you government's Exhibit No. 2 for identification purposes, which is a photograph, I ask you if that is a true representation or a true picture? A. It is.

Q. Of the spot where you found the bottle?

A. Yes, sir.

Q. And can you identify the man whose picture appears therein? A. It is my picture.

Q. And what are you holding in your hand? [24]

A. That bottle over there.

Q. And who took the picture?

A. Lieutenant Fraga.

Mr. Hoddick: I should like to offer this in evidence, your Honor.

Mr. Soares: We object to it as incompetent, irrelevant and immaterial, if the Court please. It is not a proper identification in the picture. And the time of the taking is not shown; whether it was posed for the purposes of this case or is a representation of what was seen there does not appear, we submit.

(Testimony of Richard Sasaki.)

The Court: The witness testified that it was a true picture of where he found the bottle.

Mr. Soares: That's all. But there are other things there, if the Court please. I have no objection to the Court's looking at the picture. It could not be a true picture of other things that are represented in there if, as we believe, it was taken subsequent to the time in question.

The Court: I think there should better be a better foundation for that. At the moment I will reject the offer.

Q. (By Mr. Hoddick): Sergeant Sasaki, how long after you found the bottle was the picture taken? A. I don't remember quite well.

Q. Do you remember approximately the time when you [25] found the bottle?

A. I found the bottle at about 12:55.

Q. You remember how soon thereafter Lieutenant Fraga arrived?

A. Lieutenant Fraga arrived just about that time, I believe, about 12:55 or 1:00 o'clock.

Q. Do you know what time you left the premises finally?

A. We left the premises at about 3:00 o'clock or a little shortly after that.

Q. Do you remember approximately how long before you left the premises the picture was taken?

A. I don't remember.

Q. The picture was taken some time before you left the premises?

(Testimony of Richard Sasaki.)

A. Yes, it was taken before we left the premises.

Q. What kind of a day was it, do you remember? A. I don't remember.

Q. Was there any great change in atmospheric conditions from the time you arrived until the time the picture was taken?

A. Oh, there was—all I know is there was no rain at the time.

Q. Was this stone which you are holding in your right hand in the picture——

A. It is my left hand. [26]

Q. Your left hand?

A. That's the slab that was over that hole there.

Q. Over what hole?

A. The hole where the bottle was placed in.

Q. Were there any other slabs like that in the area?

A. There's two more on the mauka side. It's in the back.

Q. Did you look under those slabs?

A. Yes, I looked under those.

Q. Was there anything under those slabs?

A. There was nothing under them.

Mr. Hoddick: I submit, your Honor, that for the purposes of—one other question.

Q. You posed for that picture, did you?

A. Yes, sir.

Mr. Hoddick: I submit, your Honor, that for the purpose of giving the Jury a better idea than words can give them of the scene where Sergeant

(Testimony of Richard Sasaki.)

Sasaki found this bottle, this picture is probably admissible in evidence. He has testified that it is a true representation of the scene at the time the picture was taken; that the stone which he is holding is the stone which covered the hole where the bottle was found; the bottle in his hand is the bottle which he found there.

Mr. Soares: Well, it also appears in the evidence that other people handled the bottle. The bottle had been opened. [27] Things had been done to it. And in addition to the other grounds heretofore urged, it is accumulative. He has described what happened.

The Court: Overruled.

Mr. Soares: Save an exception.

The Court: The document may become——

The Clerk: U. S. Exhibit "A" in evidence.

(The photograph referred to was received in evidence as "U. S. Exhibit A.")

(Mr. Hoddick shows exhibit to the Jury.)

Mr. Hoddick: No further questions.

The Court: Before you cross-examine we will take our first recess.

(A recess was taken at 11:00 a.m.)

The Court: You may cross-examine, the Jury being present, as is the Defendant together with his Attorney.

Mr. Landau: I will wait, if the Court please,

(Testimony of Richard Sasaki.)

if I may, until the jurors have all seen the picture that they are now examining.

The Court: You may proceed.

Cross-Examination

By Mr. Landau:

Q. Now Mr. Sasaki, who else was with you on this occasion on July 16, 1949, at 803 Hausten Street? [28] A. Mr. Wells——

Q. In order to make it easier for you, you have mentioned Mr. Wells, Sergeant Sousa, Sergeant Kinney, and Captain Whitford. Who else?

A. You mean between the time we got there and the time we left there?

Q. Who else went there with you?

A. Just Mr. Wells, Sergeant Sousa, Sergeant Kinney, and Captain Whitford and myself.

Q. All right. Then you say that you saw a man by the name of Montgomery driving a black Packard sedan, park it in front of the front house on the grass? A. Yes, sir.

Q. Now, at that time you were where?

A. I was still in the house on the mauka side of that address.

Q. Were you five there together?

A. Mr. Wells, Captain Whitford and I were in the apartment.

Q. And Kinney and Sousa?

A. Was in the next apartment.

(Testimony of Richard Sasaki.)

Q. I see. You were, in other words, the five of you were in somebody's home?

A. Yes, sir.

Q. Was there anybody else there, any other police [29] officer? A. No, sir.

Q. All right. Then you say you saw the Defendant in front of the front house near the black Packard? A. Yes, sir.

Q. Now, at that time were you five there alone or were there other members of your department there?

A. There was no other member there.

The Court: Speak loud so everybody can hear you.

Q. Now, when did any of the other officers arrive at the scene?

A. They arrived—I'm not too sure—about 10 or 15 minutes later.

Q. Was that after you had gone into 803 Haus-ten Street? A. Yes, sir.

Q. And who was it that came along at that time?

A. I don't quite remember who came in at the time.

Q. Well, did these other officers come together or did they come at different times?

A. Some of them came in shortly after that, I remember, after a period of, I believe, a couple of others came in.

Q. You don't know who came nor when they came?

(Testimony of Richard Sasaki.)

A. I know who came in but I cannot say what time it was. [30]

Q. You mean you know who was there when this was all over, is that what you want to say?

A. No, it wasn't all over yet.

Q. All right. Let's put it this way: After you had come into 803 Hausten Street, with Mr. Wells, you went upstairs?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And there you found a lady by the name of Helen Thomas?

A. Yes, sir.

Q. Now, how long did you stay upstairs?

A. Just a few seconds.

Q. In other words, you didn't make any search upstairs?

A. No, sir.

Q. Did you know that there was anybody upstairs when you went up there?

A. Helen Thomas was up there.

Q. When you went upstairs, did you know that she was there?

A. When I went up I saw her there.

Q. But before you went up, did you know she was upstairs?

A. I didn't know whether anybody was upstairs. [31]

Q. What's that?

A. I didn't know whether anybody was upstairs.

Q. You didn't know? But you went upstairs nevertheless?

A. Yes, sir.

Q. You did not make a search?

(Testimony of Richard Sasaki.)

A. No, sir.

Q. And as soon as you saw Helen Thomas there you asked her to come down? A. Yes, sir.

Q. And she did come down? A. Yes, sir.

Q. And you immediately thereafter?

A. What?

Q. And you came down immediately thereafter?

A. Yes, sir.

Q. Now, do you remember what bedroom Helen Thomas was in?

A. I am not sure what room she was in. Vaguely I think she was in the makai bedroom.

Q. Well, that was the first bedroom you went to, is that correct? A. Yes, sir.

Q. And you headed directly up for that bedroom and you saw her there and you told her to come down? [32]

A. Not particularly to that bedroom. I just went upstairs and I noticed her from the doorway that she was in there.

Q. But you didn't look anywhere else, is that correct?

A. Well, I asked her if there was anybody else, and she said nobody else is upstairs, so I came down with her.

Q. So you took her word for it and came right down? A. Yes, sir.

Q. Now, after you came downstairs, did you then immediately go out to the back of the house?

A. No, sir. I was in the living room.

(Testimony of Richard Sasaki.)

Q. And how long did you stay there?

A. About 10 to 15 minutes.

Q. And I understand you to say you sat in the living room? A. Yes, sir.

Q. And who was in the living room with you at the time?

A. Mr. Montgomery, Mrs. Helen Thomas, Dolores Allen, and a little girl there.

Q. After you had been there 10 or 15 minutes chatting in the living room, you then went out to the back?

A. Yes, I went to the back through the kitchen and out the back door. [33]

Q. And the first thing you did when you got outside was to search around the pipe where the laundry lines were situated, is that correct?

A. It was tilted already and it has a concrete base. There was a hole underneath.

Q. I see. And you went there directly from the house? A. Yes, sir.

Q. Is that correct? A. In the back there.

Q. And you got out there and you looked around at that concrete base and you found nothing?

A. Nothing there.

Q. And then you saw these concrete flag stones, is that correct? A. Yes, sir.

Q. And you lifted one up, is that correct?

A. Yes, sir.

Q. And under the one that you lifted was the hole with the bottle in it? A. Yes, sir.

(Testimony of Richard Sasaki.)

Q. Now, at the time that you lifted this flag stone and you found, you say, this bottle, was the bottle in this condition, Mr. Sasaki?

A. It was wrapped around like that.

Q. With tape all around it? [34]

A. No, the same plaster that's on it there.

Q. It was taped around the bottle, the top of the bottle, and over the top?

A. Just as it is except for that other piece there that was right around, excepting for this piece around.

Q. In other words, the piece of tape went completely around it? A. Yes, sir.

Q. But otherwise it was in the same condition?
The Court: What piece of tape?

Mr. Landau: This piece of tape. (Indicating.)

The Court: Oh.

Q. Is that the only change, Mr. Sasaki, between what you found, the manner in which you found it, and the condition that it is today?

A. Yes, sir.

The Court: You will have to speak louder so we can hear you. The lawyers have to hear you and the 12 jurors have to hear each word you say, so make your answers loud enough so we can hear each word. I understand your answer to that was yes.

The Witness: Yes, sir.

Q. Now, Mr. Sasaki, the thing that struck you immediately was that you pulled up this slab and

(Testimony of Richard Sasaki.)

looked at the bottle, was that it was an Ovaltine bottle, is that correct? [35] A. Yes, sir.

Q. Now, looking at that picture, Mr. Sasaki, I ask you if this does not indicate—strike that. What is this white substance around the bottle?

A. That's that wax paper.

Q. The wax paper?

A. It wasn't completely around.

Q. You say it was not completely around?

A. No.

Q. But it covered that pretty well, did it not?

A. Just on this portion here, like that, the way it is there. (Indicating.)

Q. You say that the bottle was covered about the same way it is today in this courtroom?

A. Except for that plaster around it.

Q. Now, you are certain that except for the plaster which——

The Court: I can't hear you. And don't talk while you are being asked a question. Let's start over again. Listen to the question.

Q. Except for the tape which is partly wedged together here and which at that time went completely around the bottom of the bottle, the condition is exactly the same?

A. Except for a little of this wax paper was down here.

Q. All right. Now, you have added a little additional [36] feature. Tell me how much of the wax paper covered the bottle?

(Testimony of Richard Sasaki.)

A. Just about what it is now here.

Q. Are you sure about that, Mr. Sasaki?

A. As far as I can recollect.

Q. Well, now, looking at the picture, this posed picture in which you are holding the bottle, I ask you whether or not this picture does not show considerably more of the wax paper covering that bottle?

A. The paper could be on this side, but on the other side it is about the same.

Q. Well, now, let's turn this bottle around slowly. You have seen all sides of that bottle now, have you? A. Yes, sir.

Q. And I ask you now whether this posed picture of you does not show considerably more of that Ovaltine bottle covered by the wax paper than you had identified today?

A. Well, the picture shows only on one side.

Q. That's why I turned the bottle around completely. You show me one side which corresponds to this picture?

A. It should be on this side here. (Indicating.)

Q. Now, look at that picture, please. Does that picture show the bottle is more covered than that?

A. Slightly more than this.

Q. Slightly more? Now, look at it, please. And you [37] just say slightly more? A. Yes, sir.

Q. Now, as a matter of fact, you went directly to the cement at that laundry pole and to the cement on the walk because somebody had tipped you off

(Testimony of Richard Sasaki.)

that you'd find some stuff under the concrete, isn't that the fact? A. No, sir.

Q. But you did nevertheless go directly to those spots which I have mentioned?

A. The reason——

Q. Just answer my question. You did go there, didn't you? A. No, sir.

Q. Didn't you tell me that you immediately went out to the back and went to the laundry pole and looked around the cement there and that was the first thing you did? Didn't you so tell me?

A. I glanced over across there and I noticed that.

Q. You did go to the laundry pole the first thing, didn't you?

A. After not seeing anything outside there, I went over there. I saw that the ground was all clear.

Q. In other words, you saw no other cement on the ground, is that what you want us to believe?

A. On that side of the house? [38]

Q. Yes. A. Yes, sir.

Q. I see. So you went to the first place where you did see some cement and that was where the laundry pole was? A. Yes, sir.

Q. Then you looked around there and you saw nothing there, is that correct?

A. Well, I checked the tree there. There was a tree.

Q. Wait a second. Answer my question. You

(Testimony of Richard Sasaki.)

checked around the foot of the base of this laundry pole? A. Yes, sir.

Q. And then you went to the flag stone, isn't that what you told the jury a few minutes ago, Sasaki? A. Now I remember.

Q. Now you remember something else?

A. No I remember.

Q. Let's see what else you remember?

A. There was—I don't know whether it is an incinerator or something like that, made out of bricks or something of that sort in the back there, a fireplace or something.

Q. You looked there?

A. I looked there first.

Q. You didn't find anything there?

A. No, sir.

Q. Then you went to the flag stone? [39]

A. I checked all around there on the side and finally came to the flag stone.

Q. In other words, your search—you looked around and saw no other cement, isn't that correct?

A. There's two more other blocks there.

Q. Yes, I know there are two other blocks. There are three blocks there together.

A. Yes, sir.

Q. But after you got through searching the incinerator you looked around and saw these cement blocks, isn't that right? A. Yes, sir.

Q. And you went to the first one—strike that. You went to one and lifted it and there was the bottle?

(Testimony of Richard Sasaki.)

A. I didn't go to that. I checked the first two first and I didn't see any disturbance around it so upon glancing on the third one I saw a disturbance on the side of it, so I lifted it up.

Q. Well, didn't you tell the jury just a few minutes ago, in answer to my question, that you went immediately to the cement block and you lifted it up and you found——

A. I didn't go immediately.

Q. I am asking you, didn't you tell me and the jury and the Court that just a few minutes ago?

A. I didn't say I went immediately there. [40]

Q. And didn't you say, Mr. Sasaki, that it was under the first block that you looked at?

A. No, sir.

Q. You deny that, Mr. Sasaki?

A. I looked upon——

Q. Just answer my question. You deny that you told the jury that?

A. I may have said that.

Q. You may have said that?

A. I am not sure.

Q. Now, you testified before the U. S. Commissioner on this matter some months ago, did you not, Mr. Sasaki?

A. Yes, sir.

Q. And you remember that the U. S. Commissioner was Magistrate Harry Steiner?

A. Yes, sir.

Q. And you gave the testimony there on August 17, 1949, in his office in the District Court of Honolulu?

A. Yes, sir.

(Testimony of Richard Sasaki.)

Q. Now, at that time did you say anything—strike that. At that time, isn't it a fact that you said absolutely nothing about Lieutenant Fraga taking the prints off that bottle?

A. The question again?

The Court: Where has there been testimony that there [41] were prints taken?

Mr. Landau: He testified on direct examination, if the Court pleases, that Lieutenant Fraga came to take prints off the bottle.

The Court: Well, his testimony was that he held the bottle in a certain way so that Lieutenant Fraga could take prints. There was no testimony that he did take any prints.

Mr. Landau: It was after Mr. Wells had counted the capsules he stated, and put them back in the bottle, this witness stated that Lieutenant Fraga came down to take the prints off the bottle.

The Court: Yes, but there is no testimony that he did take any prints, which your question implies. This witness has never testified that anybody took any fingerprints off the bottle but that he was holding it in that way so they could be taken.

Mr. Landau: All right.

Q. At that hearing you didn't say anything about Lieutenant Fraga having appeared to take the prints off the bottle, did you?

A. I won't deny it.

Q. You wouldn't deny it? A. No.

Q. Your memory as to what had occurred and

(Testimony of Richard Sasaki.)

all the facts was clearer at that time than it is today, of course? [42]

A. It wasn't as clear as the day we went to the place.

Q. No, but at that time, August 17th, it was clearer than it is today?

A. It could be clearer. I am not sure about that.

Q. Now, you say the reason you picked up this particular flag stone is because you saw a hole, isn't that right?

A. Yes, sir.

Q. Now, let me ask you whether or not you remember this question which was asked you by Mr. Hoddick:

“Question. Where did you find that bottle?

“Answer. In the rear of the house under a concrete slab. There was a hole dug under the concrete slab and it was the bottle—the bottle was placed in the hole.

“Question. Was that hole visible when you looked at the slab?

“Answer. No, it is not.”

So I therefore take it you testified you saw no hole?

A. I believe——

Mr. Hoddick: Excuse me. Is there a question here?

The Court: I didn't hear any. What is your question? You are concluding in your statement that what his testimony there was that he is now here to answer the question based on what you read. What is your question?

(Testimony of Richard Sasaki.)

Q. Do you remember testifying to that effect? [43]

A. I remember vaguely saying that there was a disturbance on the side of it.

Q. You deny that when Mr. Hoddick asked you the question, was that hole visible when you looked at the slab, that your answer was, "No, sir, it is not"?

A. I said there was a disturbance.

Q. I say, whether you deny making that answer to the question at that time put to you by Mr. Hoddick?

A. I won't deny what I said at the time.

Mr. Hoddick: We will stipulate that he did.

Mr. Landau: I don't want any stipulation from Counsel, if the Court pleases. I think it is unfair. I am asking this witness a question.

The Court: You don't need to accept his stipulation.

Mr. Landau: But I don't think it is fair for Counsel to come in and say we will make a stipulation. I am examining this witness on cross-examination.

The Court: Go right ahead.

Mr. Landau: May I have the last question and answer?

(The reporter read the last question and answer.)

Q. Your memory at that time was better than it is today, isn't that correct, Mr. Sasaki?

(Testimony of Richard Sasaki.)

A. Well, it could have been—it wasn't too far off from the time the arrest was made.

Q. So that what you testified there before the U. S. [44] Commissioner was more in keeping with your memory of it as it actually happened?

A. Well, I can recall after talking over with the boys what happened, I can recollect now more things that happened. I may have missed——

Q. In other words, you now remember more things about this incident than you remembered on August 17th, is that correct?

A. I could recall.

Q. In other words, your memory is better today than it was on August 17th?

A. I won't say that my memory is better.

Q. But you did say you can recall more things today than you could then, is that what you said?

A. I said I could by reviewing the things with the boys in the last few days, I could recall more.

Q. I see. You mean that you and the boys got together and talked about this case and now you remember more things, is that right?

A. It's been quite a while and some of the things I missed I could get back.

Q. August 17th, it was about a month after this raid wasn't it? A. Yes, sir.

Q. How was your memory then, pretty good? [45]

A. I'd say it was all right.

Q. But in the last few days you and the rest of

(Testimony of Richard Sasaki.)

the witnesses have talked this case over with one another and you have been refreshed as to some other factors?

A. I talked over with Mr. Hoddick then.

Q. I know. You also said you talked with some of the boys?

A. Yes, sir, the boys that were on the raid.

Q. That's right.

A. To refresh our memories.

Q. So now your memory is better because you talked over the case with the boys?

A. Not only that. When you stated about that concrete slab, I completely forgot about that brick fireplace, and since you brought up that stuff I recollect that there was something like that.

Q. In other words, your memory today is better than it was on August 17th?

A. I won't say it's better.

Q. But you can remember more things about it than you did then?

A. As the case goes on I can recollect.

Q. Now you have, in answer to but not direct answer, to some of my questions you said there was a disturbance. Giving you the benefit of all the doubt, will you tell us [46] what that disturbance was?

A. It is dirt there and somebody has done something to the dirt, and you can more or less tell.

Q. And you can see that without lifting the slab?

A. Yes, sir.

(Testimony of Richard Sasaki.)

Q. In other words, it was on the ground? There was something on the ground, the dirt itself, that called your attention and nothing on the slab?

A. Not on the slab.

Q. All right. Now, let me ask you if you remember being asked this question by Mr. Fairbanks at that same place and time. You answered there was a hole in the slab, and the question was,

“Well, you didn’t know when you looked at it?”
Your answer was,

“When I checked there were three concrete slabs there. When I checked, when I looked at those three I saw a slight mark on the one that I turned over.” Wasn’t that your answer, Mr. Sasaki, at that time?

A. I won’t say—I believe I told him there was a slight disturbance, a mark on the side of it.

Q. Now, Mr. Sasaki, do you remember this answer? “When I checked there were three concrete slabs there. When I checked, when I looked at those three I saw a slight mark on the one that I turned over.” [47] You remember that answer? Do you deny making that answer?

A. I won’t deny making it.

Q. Is it possible that you did give that answer?

A. I could have given that answer.

Q. We got sidetracked a little bit, Mr. Sasaki. I was asking you about when the other police officers

(Testimony of Richard Sasaki.)

came. Now, with reference to the time that you went outside of the house, had any other police officers arrived?

A. Officer Marcotte and I think a couple of others came in. So I told Marcotte to stand by.

Q. Do you know who the others were?

A. I don't recollect who it was.

Q. Well, you mentioned that Mr. Case was there. Was he there at the time or had he come before or after that?

A. Case came after, when I was just about, just about lifting up the slab up.

Q. Well, what was Mr. Case doing at the time, if you remember?

A. I believe he was checking on the side, makai side of the house, and he just came around the corner.

Q. In other words, the first time you saw him that morning is when he happened to bump around the corner, came around the corner, is that correct?

A. No, sir, I saw him at Drier Manor.

Q. Well, now who was at Drier Manor? [48]

A. Case, Pestano, Ferry, Mr. Wells, Sousa came in, myself.

Q. Well, in other words, everybody who finally got there before you broke up and went home, were all at Drier Manor?

A. Excepting for Lieutenant Fraga and Chief Liu, as far as I can remember.

Q. In other words, you were all there, but five of

(Testimony of Richard Sasaki.)

you came down and stayed there about three hours, two to two and one-half hours, is that correct?

A. Yes, sir.

Q. And then, after you got in there, a few more came on the scene.

A. After we got in there, I think it was Captain Whitford went up to us to telephone, to call the rest of them.

Q. I see.

Mr. Landau: I believe that's all, if the Court please.

The Court: Where did Marcotte come from?

The Witness: He was—I don't know where he came from, but he was at Drier Manor when we left, Mr. Wells, Sergeant Sousa and I left. They were still there in the Drier Manor at that time.

The Court: Then Marcotte was in the Drier Manor with Case, Pestano and Ferry? [49]

The Witness: He could have been there or somewhere else after that.

Mr. Landau: No questions.

The Court: Redirect?

Redirect Examination

By Mr. Hoddick:

Q. Sergeant Sasaki, there has been talk about Lieutenant Fraga coming to take some fingerprints. Did he test that bottle for fingerprints in your presence?

(Testimony of Richard Sasaki.)

A. Yes, in my presence and Mr. Wells'. There were several others.

Q. Who handed the bottle to Lieutenant Fraga?

A. I did.

Q. And did he hand it back to you?

A. Yes, sir.

Q. Were you present all the time that Lieutenant Fraga was testing it?

A. Yes, sir.

Q. Did he open the bottle?

A. No, sir.

Q. Mr. Landau has referred to the Commissioner's hearing and a question which I asked you was——

“Was that hole visible when you looked at the slab?” You understand the meaning of the word “visible”?

Mr. Landau: If he didn't, if the Court pleases, this [50] isn't the time to find out. He answered the question then in August.

The Court: What is the question, Do you now understand the meaning of the word “visible”? Or did you then?

Mr. Hoddick: Well——

Q. Did you then understand the meaning of the word “visible”?

A. I could have mistaken the question.

Q. When you answered that question, what hole did you have in mind?

Mr. Landau: I object, if the Court please. The question and answer apparently speak for themselves. This isn't the time to try to get some ex-

(Testimony of Richard Sasaki.)

planation to some testimony which he gave in August.

The Court: I think it speaks for itself. It is argumentative.

Mr. Hoddick: No further questions.

Mr. Landau: That's all. Oh, just one question. I'm sorry.

Q. (By Mr. Landau): You didn't at the Commissioner's hearing tell the Commissioner and the attorneys there anything about Lieutenant Fraga testing the bottle for fingerprints?

The Court: Was he asked?

Mr. Landau: Counsel just asked him that question. [51]

The Court: No, he asked him that question in this case, but you are asking him if he told anything in that case. Well, let's find out if he was asked anything first at the Commissioner's hearing. If he wasn't asked, there is no occasion for such a question.

Q. (By Mr. Landau): You mentioned Lieutenant Fraga in your testimony down there, didn't you, Mr. Sasaki? Well, I will withdraw it.

The Court: All right. You are excused.

(Witness excused.)

The Court: Next witness. We might as well get his pedigree. We can do that in five minutes.

Mr. Hoddick: Roy Case.

ROY F. CASE

a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

The Court: Will you please state your name?

The Witness: Roy F. Case.

The Court: Age?

The Witness: Thirty years.

The Court: Residence?

The Witness: 3066 Kolowalu Street, Honolulu.

The Court: Occupation?

The Witness: Police officer.

The Court: Honolulu Police Department?

The Witness: Yes, sir. [52]

The Court: You are a citizen of the United States?

The Witness: I am.

The Court: Exclusively?

The Witness: Exclusively.

The Court: Take the witness.

Direct Examination

By Mr. Hoddick:

Q. How long have you been with the Honolulu Police Department, Mr. Case?

A. Since September 18, 1945.

Q. And in July of 1949 with what branch of the Honolulu Police Department were you serving?

A. In the vice division.

Q. How long have you been on the vice squad at that time?

A. One year.

(Testimony of Roy F. Case.)

Q. Do you know the defendant, Winston Churchill Henry? A. Yes, I do.

Q. Will you point him out, please?

A. Sitting there with the purple, lavender jacket on.

Mr. Hoddick: Let the record show that he has identified the Defendant.

The Court: The witness is color-blind.

Mr. Laudau: He identified the Defendant but not the color. [53]

The Court: I would agree.

Q. (By Mr. Hoddick): Do you have any trouble with your eyesight, Mr. Case?

A. No, sir. That's maroon.

Q. Did you have occasion to go to 803 Hausten Street—withdraw that question. Did you have occasion to see the Defendant during July of 1949?

A. Yes, I did.

Q. And where did you see him?

Mr. Landau: You mean any time during July?

Mr. Hoddick: I will fix the date.

Q. Where did you see him during July?

Mr. Landau: He might have seen him every day of the week, every period during the month.

Mr. Hoddick: Let him answer the question.

A. I saw him at 803 Hausten Street.

Q. And what date was that? A. July 16th.

Q. About what time of the day, Mr. Case?

A. At 1:08 p.m.

Q. Where were you prior to going to 803 Hausten Street?

(Testimony of Roy F. Case.)

A. At the Barbecue Inn on Kalakaua Avenue.

Q. And what were you doing there?

A. On instructions of Captain Whitford I was to assist [54] Mr. Wells and I had instructions to remain at the Barbecue Inn on Kalakaua Avenue and observe Mr. Churchill's residence at 408 Keanianu Street.

Q. Why did you go over to 803 Hausten?

A. I received a phone call that I was needed there to assist Mr. Wells and other officers in searching for narcotics on the premises in 803.

Q. What happened after you arrived at 803 Hausten?

The Court: We will stop at this point for our noon recess. I will take a noon recess now until two o'clock.

(The Court recessed at 12:00 noon.) [55]

Afternoon Session

The Court: Now back to Criminal 10253. The jury is present as is the defendant, together with the attorneys.

ROY F. CASE

resumed the stand and testified further as follows:

The Court: You are Mr. Case, the same witness who was sworn earlier in this case today?

The Witness: Yes, sir.

The Court: I remind you that you are still under oath. You may proceed with your direct examination.

(Testimony of Roy F. Case.)

Mr. Hoddick: Will you repeat the last question and answer, please?

The Court: You were about to ask him what he did when he got to a certain numbered place on Hausten Street, he having just testified that he left the Barbecue Inn on Kalakaua in response to some message from Captain Whitford, I believe.

The Witness: Yes, sir.

Direct Examination

(Continued)

By Mr. Hoddick:

Q. Mr. Case, will you relate what happened after you arrived at 803 Hausten Street?

A. Yes, sir. As I entered the premises and walked along the makai side of the house towards the rear, and just as I rounded the makai Koko Head corner of the house, I seen [56] officer—Sergeant Sasaki lifting up a cement stone, flagstone, and I walked over to him, and there was a bottle that was labeled “Ovaltine.” It had been laying away underneath this stone. And upon seeing this I called to Mr. Wells, who immediately came out to the location, and we looked at the bottle, the contents.

Q. Did Mr. Henry come with Mr. Wells?

A. Yes, he did. And Officer Sasaki received instructions from Mr. Wells to keep the bottle in his possession and its contents, and I continued to search the area in the rear of that location.

(Testimony of Roy F. Case.)

Q. Mr. Case, did you later see this bottle again?

A. Yes, sir, I did.

Q. Did you place any identifying marks on that bottle? A. Yes, I did.

Q. Showing you Government's Exhibit No. 1 for identification purposes, I ask if this is the bottle which you saw Sergeant Sasaki take out from under the stone slab?

A. I can tell if I find my initials. Here they are here, "RFC."

Q. Thank you. You say you continued your search?

A. Yes, sir, I did.

Q. And what were you searching for?

A. I was searching for narcotics.

Q. And where did you research? [57]

A. I searched the area or the, that is the immediate area in the rear of that location, back yard of 803 Hausten Street and the open patio there. I noticed a canvas sun couch, and upon lifting up the pillow, or head rest—it just lifts up and folds back—a small bottle dropped down and fell onto the seat part of the couch.

Q. Will you describe that bottle?

A. Yes, sir, it was white, about two inches high and it had—its contents were what I suspected to be cocaine.

Mr. Landau: Objected to and ask that it be stricken, if the Court please, and that this witness be instructed to describe the color and substance if

(Testimony of Roy F. Case.)

he wishes, and by any name is highly improper at this time; and ask the jury to be instructed to disregard it.

The Court: What the witness suspected it was is not evidence of what it was; therefore that expressed suspicion of his is stricken and the jury instructed to disregard it.

The Witness: It was a white bottle approximately 2 inches high.

Q. (By Mr. Hoddick): Mr. Case, do you mean that the bottle, the glass part itself, was white?

A. Yes. The contents therein were also white crystal form, looking something like epsom salts.

Q. Could you see through the bottle?

A. Yes, sir, I could. It had a cork stopper and a [58] piece of paper wrapped around the cork.

Q. And what did you do with that bottle?

A. I immediately called to Mr. Wells, who came out of the house with Mr. Churchill, and I picked the bottle up.

Q. When you say "Mr. Churchill," you mean the defendant?

A. Mr. Winston Churchill Henry, yes, sir. Picked the bottle up and showed it to Mr. Wells. I received instructions to take it with me wherever Mr.—the defendant went and keep it in his presence. And we then all of us entered the house and went upstairs. I continued to hold onto the bottle in his presence until Lieutenant Fraga arrived to take fingerprints off of the bottle.

Q. Did Lieutenant Fraga take the bottle in his

(Testimony of Roy F. Case.)

possession for the purpose of taking fingerprints?

A. No, sir, I held the bottle while he dusted it and tried to lift any possible prints from it.

Q. You never lost possession of the bottle?

A. No, sir; I then, after he had dusted it for fingerprints, I retained it in my possession until I handed it to Mr. Wells, who was standing right there, in the presence of the defendant and all of us.

Q. Where was that?

A. This was in the dining room of 803 Hausten Street, and Mr. Wells——

Q. One second. Did Mr. Wells ever give the bottle [59] back to you after you handed it to him in the dining room?

A. Oh, yes, sir, immediately after. He looked at the bottle and asked Mr. Henry what he estimated that to be. He said about—Mr. Wells said, “This is about 200 grains, don’t you think so, Henry?”

And Mr. Henry said, “More than that.”

Q. What did Mr. Henry say?

A. “More than that.”

So Mr. Wells pulled the bottle stopper out and dipped his finger into the contents of it and rubbed it on his tongue.

Q. Was Mr. Henry there at that time?

A. Yes, sir.

Q. Did he say anything? A. Yes, sir.

Q. What did he say?

A. He said, “Man, that is dynamite. Billy, you

(Testimony of Roy F. Case.)

know better than that." So Mr. Wells remarked that his tongue felt a little numb and he——

Q. Go ahead.

A. He replaced the stopper and gave it to me and told me to keep possession of it until it was properly turned over to him.

Q. When did you turn the bottle over to Mr. Wells, if you did?

A. Immediately—as soon as we reached the vice division [60] of the Honolulu Police Station, I sealed the bottle and initialed it and turned it over to Mr. Wells in Captain Whitford's office.

Q. Did anybody else initial the bottle in your presence? A. Yes, sir.

Q. Who?

A. Officer Shaffer, Mr. Wells, Sergeant Sousa, Sergeant Kinney, Officer Sasaki, Richard Sasaki, and there may have been others.

Q. Except for those initials, from the time you found the bottle on this sun couch until the time that you gave it to Mr. Wells down at the vice squad office, was there any change in the condition of the bottle and the condition of its contents?

A. No change in the condition of the contents, and the only conditional change of the bottle was that I sealed it with yellow supplementary paper and scotch tape.

Q. And where did you do that?

A. In the vice division room.

Q. Were there any pictures taken of this sun couch where you found the bottle?

(Testimony of Roy F. Case.)

possession for the purpose of taking fingerprints?

A. No, sir, I held the bottle while he dusted it and tried to lift any possible prints from it.

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So Mr. Wells pulled the bottle stopper out and dipped his finger into the contents of it and rubbed it on his tongue.

Q. Was Mr. Henry there at that time?

A. Yes, sir.

Q. Did he say anything?

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Q. What did he say?

A. He said, “Man, that is dynamite. Billy, you

(Testimony of Roy F. Case.)

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Q. Go ahead.

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A. Yes, sir.

Q. Who?

A. Officer Shaffer, Mr. Wells, Sergeant Sousa, Sergeant Kinney, Officer Sasaki, Richard Sasaki, and there may have been others.

Q. Except for those initials, from the time you found the bottle on this sun couch until the time that you gave it to Mr. Wells down at the vice squad office, was there any change in the condition of the bottle and the condition of its contents?

A. No change in the condition of the contents, and the only conditional change of the bottle was that I sealed it with yellow supplementary paper and scotch tape.

Q. And where did you do that?

A. In the vice division room.

Q. Were there any pictures taken of this sun couch where you found the bottle?

(Testimony of Roy F. Case.)

A. Yes, sir. Lieutenant Fraga took pictures of the head rest where the indentation of the bottle against the pillow had been pressed—where the bottle had been pressed into the pillow, leaving an indentation. He took that of the [61] sun couch.

Q. And how long was that picture taken after you found the bottle?

A. Shortly afterwards, within a few minutes.

Q. Were there any severe changes in the atmospheric conditions from the time you found the bottle until the time those pictures were taken?

A. No, sir.

Mr. Hoddick: May I have these marked for identification purposes.

The Court: Two pictures?

Mr. Hoddick: Yes, your Honor.

The Court: They may be marked for identification as——

The Clerk: United States Exhibits Nos. 3 and 4.

(Thereupon, the documents above-referred to were marked United States Exhibits Nos. 3 and 4, for identification.)

Q. (By Mr. Hoddick): Showing you United States Exhibit No. 4, Mr. Case, I ask you if this is an accurate picture and portrayal of the sun couch where you found the bottle?

A. Yes, sir, this is the upper half, the back and head rest.

Q. And in what position is the head rest in that picture?

(Testimony of Roy F. Case.)

A. The head rest is facing mauka. The pillow is up.

Q. Showing you United States Exhibit No. 3, for identification [62] purposes, I ask you if this is an accurate picture and portrayal of the entirety of the sun couch.

A. Yes, sir, that is.

Q. And in what position is the head rest in that picture?

A. Down.

Mr. Hoddick: I would like to offer these in evidence, your Honor.

Mr. Landau: No objection.

The Court: They may become——

The Clerk: No. 3 as United States Exhibit B, and No. 4 as United States Exhibit C.

(Thereupon, the documents heretofore marked United States Exhibits Nos. 3 and 4 for identification were received in evidence as United States Exhibits B and C, respectively.)

Q. (By Mr. Hoddick): When did you place your initials on the bottle which you found, Mr. Case?

A. I don't recall the exact time, sir, but it was when we reached the police vice room, approximately four o'clock.

Q. After you got to the police station?

A. Yes.

Mr. Hoddick: I should like to have marked for identification purposes a small bottle.

The Court: It may be marked for identification.

(Testimony of Roy F. Case.)

The Clerk: United States Exhibit No. 5, for identification. [63]

(Thereupon, the article above-referred to was marked United States Exhibit No. 5, for identification.)

Q. (By Mr. Hoddick): Mr. Case, showing you United States No. 5, for identification purposes, I ask you if you can identify it.

A. Yes, sir, that is the bottle.

The Court: What?

The Witness: Yes, sir, this is the bottle. It has my initials, my writing, and sealed as I sealed it.

Q. (By Mr. Hoddick): This is what bottle?

A. The bottle I found at 803 Hausten Street.

Q. On the sun couch?

A. On the sun couch.

Q. And can you find your initials thereon?

A. Yes, sir, at the top.

Q. Was this paper around the bottle at the time you found it?

A. No, sir, I placed that paper around there myself.

Q. Was there any paper on the bottle at the time you found it?

A. There was no paper with the exception of a little bit that was plugged in with the cork.

Mr. Hoddick: No further questions.

The Court: Cross-examination.

(Testimony of Roy F. Case.)

Cross-Examination

By Mr. Landau: [64]

Q. In other words, immediately upon receiving the radio call, you went to 803 Hausten Street from Kalakaua?

The Court: Radio call?

Q. (By Mr. Landau): You received a radio call, didn't you?

A. No, sir, I received a telephone call.

Q. Was it a telephone or radio telephone?

A. Telephone.

Q. And you immediately left to go to Hausten Street?

A. Not immediately; within five or ten minutes.

Q. And then you walked into the premises, the yard, and walked around to the back and side; is that correct?

A. Yes, sir.

Q. And just as you got there, Sasaki was lifting up the cement flagstone?

A. That is correct, sir.

The Court: Speak louder.

The Witness: Yes, sir, that is correct.

Q. (By Mr. Landau): Did he see you at that time or did you see him?

A. Well, I saw him first; then as he raised up the stone, why then he saw me.

Q. Then he saw you. Well, then, he didn't have to do anything to call your attention to the fact that he had found this bottle there, did he, Mr. Case?

A. Well, he didn't have to, no.

(Testimony of Roy F. Case.)

ing and know what transpired while he was gone. But that portion was not in that section.

The Court: Well, if you are proposing to quote what a witness this morning said, we will have to call for the transcript.

Mr. Landau: I will withdraw the question until such time as the reporter is available, if the Court please.

Q. (By Mr. Landau): Well, at any rate, you saw the bottle under there and you called Mr. Wells; is that correct? A. Yes, sir.

Q. Now, where was the flagstone at that time, Mr. Case? Was it over the hole or had it been removed?

A. When I first seen it, it was being held in an upright position by Officer Sasaki.

Q. Now, when did you put your initials on that bottle? Exhibit 2, for identification, I think, isn't it? I am talking about the big bottle.

A. I put my initials on that bottle at 803 Hausten Street.

The Court: That is Exhibit 1, for identification.

Mr. Landau: I am sorry. [68]

Q. (By Mr. Landau): When?

A. At about 1 p.m. in the afternoon, or a little later.

Q. About 1 p.m.?

The Court: What was that? What did the witness say?

(Answer read.)

(Testimony of Roy F. Case.)

Q. (By Mr. Landau): Not that the times are going to be very material, but let me call your attention to the fact that you testified that you got there about 1:08 p.m. I don't want you to be taken by surprise.

A. Well, I got there at about 1:08 p.m. I don't recall exactly, but it was shortly after the bottle was found.

Q. Was it before you continued to search or after you continued to search that you put your initials on that bottle?

A. It was after—it was after I had found my bottle.

The Court: What time of the day was this, morning, noon, night?

The Witness: In the afternoon, sir.

Q. Well, now, this area where the—what would you rescribe this as, a couch or chaise lounge?

A. I would describe it as a sun couch.

Q. OK, let's call it a sun couch. This area in which this sun couch was found was close to the area where the Ovaltine bottle was found; isn't that correct? [69]

A. Yes, sir.

Q. And, as a matter of fact, looking at Government's Exhibit No. 3 for identification, it shows a picture of the flagstone, does it not, the one that was lifted off the ground?

A. I am not sure if that is the flagstone.

Q. Well, now, take a look at the picture that is in evidence, which is Exhibit A, and I ask you

(Testimony of Roy F. Case.)

whether or not you see a hollow tile wall there next to the flagstone? A. Yes, I do.

Q. And at the bottom of the tile wall there is a rough base of some kind? A. Yes, I see that.

The Court: What?

Mr. Landau: Base.

The Court: I know, but I have got to hear him.

The Witness: Yes, I see that.

Q. (By Mr. Landau): And now looking at United States Exhibit 3 for identification, I ask you if you see a tile wall in that picture.

A. Yes.

Q. Do you see a rough base on that picture?

A. Yes.

Q. And do you see a flagstone which looks as though it is the same flagstone as in the picture in evidence? [70] A. It appears to be, yes.

Q. You were there, Mr. Case; I was not. As a matter of fact, from your memory of it, it is the same flagstone, the same area, isn't it?

A. It may be, but I am not sure.

Q. Well, let's put it this way. How far from the flagstone where the Ovaltine bottle was found was this sun couch? A. Oh, about 15 feet.

Q. About 15 feet. In other words, you walked away from the area where the flagstone was and walked on a paved patio? A. Yes.

Q. And just around the paved patio was the sun couch? A. Yes.

Q. And this is the picture, Exhibit B-3 for identification——

(Testimony of Roy F. Case.)

The Clerk: It is in evidence.

Mr. Landau: I am sorry.

The Clerk: They are both in evidence.

Q. (By Mr. Landau): Exhibit B in evidence, isn't that the description you have just given the Court and jury? A. Yes.

Q. About 15 feet from the flagstone. As soon as you got off the area where the flagstone was, you stepped on a paved porch patio? [71]

A. Yes.

Q. And just around the corner was a couch?

A. Yes.

Q. So that is a picture showing the flagstone, the patio, and the couch; isn't that correct?

A. This appears to be the flagstone. I am not sure that it is.

Q. Let's put it this way: The flagstone that was lifted to make visible this bottle of Ovaltine was in the area to the right of the picture; is that correct? Right in here (indicating)?

The Court: Exhibit——

A. It was located in that area, yes.

The Court: The picture is Exhibit B?

Mr. Landau: Exhibit B, yes, your Honor. I would like to have the Jury look at this picture so they can understand what we are talking about, too.

(Handed to jury.)

Q. (By Mr. Landau): In other words, as you came away from the area where the flagstone had been lifted from the ground to make visible this

(Testimony of Roy F. Case.)

bottle of Ovaltine, the first bit of furniture that came into your view was this couch? A. Yes.

Q. And so you lifted up the pillow; is that correct? A. No.

Q. What did you do? [72]

A. I searched along the stone wall there in the hollow tile portion from the top down until—there were some flower boxes there. I looked along that portion where the flower boxes were. On the makai side there were some bricks. I looked along there. I searched over by a barbecue pit in the far mauka Koko Head corner of the lot.

Q. Didn't Sasaki tell you that he had already searched there and there was nothing there?

A. He didn't say anything to me.

Q. He didn't say anything to you?

A. In reference to that.

Q. You didn't say anything on direct examination about the various places that you had searched. Was that something you overlooked, Mr. Case?

A. I didn't say anything about it. I hadn't overlooked it.

Q. What is that?

A. I said I didn't say anything about it.

Q. I say, you overlooked that in your direct examination.

A. I didn't mention it; that is all.

Q. But you eventually got to the couch, didn't you? A. Yes, sir.

Q. When you got to the couch, you lifted up the

(Testimony of Roy F. Case.)

pillow, is that right? [73] A. That's right.

Q. Now, at the time you lifted the pillow, let me ask you this question: Were you in the back of the head of the couch, or on the side of it?

A. I was in back of it.

Q. I see. In other words, you walked over, there is the couch lying down in this general area, you run back and you lift up the pillow; is that correct?

A. Yes, sir.

Q. And as you lifted up the pillow, the bottle dropped? A. Yes, sir.

Q. In other words, the only thing that was holding the bottle in that position was the weight of the pillow?

A. The pillow had been pressed so that the bottle made an indentation. It may have had something to do with holding it there.

Q. How long after you found this bottle was this picture taken? A. Oh, about half an hour.

Q. About a half hour. Do you know what this pillow was made of, what the filling consisted of?

A. I don't know what the filling consisted of.

Q. Was it soft, light fluffy material, or what was it? A. The outer covering was canvas.

Q. What was the inside? [74]

A. I don't know what the inside was.

Q. Was it soft or firm, or what was the consistency? A. It felt rather firm.

Q. It felt rather firm. You saw nothing on the couch, pillow or the couch itself, which would en-

(Testimony of Roy F. Case.)

able a bottle to remain there, like a hook or anything of that kind?

A. No, I didn't see anything like that.

Q. In other words, the only thing that kept the bottle there was the weight of the pillow on it?

A. Possibly, yes.

Q. Well, you saw nothing else that would keep it there, did you?

A. Only that it was pressed there, the pillow was pressed.

Q. Was there any mark on the outside?

A. No, there wasn't.

Q. Did you ever see the couch after the picture was taken? A. Yes.

Q. Was the mark still there? A. Yes.

Q. In other words, the mark never disappeared?

A. Not while I was there that I know of.

Q. Now, do you know whether Mr. Wells gave you the same instruction with reference to the handling of the bottle [75] that he gave Mr. Sasaki?

A. I don't know if it was exactly the same instructions, but Officer Sasaki and I, upon recovering the two bottles, we were together in the presence of the defendant per instructions of Mr. Wells.

Q. You mean after you found the——

Mr. Landau: Strike that.

Q. (By Mr. Landau): After Sasaki found the bottle, he was never out of the presence of the defendant?

A. I couldn't say that because I was still search-

(Testimony of Roy F. Case.)

ing while he was in the presence of the defendant out of my presence. I don't know whether he was in the presence of the defendant or not.

Q. After you found your bottle, were you and Sasaki together all the time?

A. I don't know whether we were together all the time or not, but I was in the presence of the defendant all the time.

Q. Well, then, you were mistaken, when you said previously, in answer to my question, that you and Sasaki were together all the time in the presence of the defendant after you found your bottle?

A. Will you repeat that again, please.

(Question read.)

A. Up until the time that Officer Sasaki was—had [76] counted the capsules, whatever it was in the bottle.

Q. You were together then from the time you found your bottle until the capsules in the Ovaltine bottle were counted; is that correct?

A. That's right.

Q. Then what happened? Did you separate?

A. Well, I don't—we left the address after the capsules were counted and Mr. Wells tasted the contents of the bottle that I had and gave it back to me, then we all went to the police station after that. The search was over.

Q. Do you know whether Lieutenant Fraga actually took any fingerprints off your bottle or Sasaki's bottle?

(Testimony of Roy F. Case.)

A. He took two prints off the bottle that I found, but whether they were substantial prints or not, I don't know.

Q. You have never inquired?

A. I never.

Q. How about the other bottle? Do you know anything about that?

A. I know he dusted it for prints, but whether he got any or not I don't know.

Q. Now, you weren't called to testify by Mr. Hoddick in the preliminary hearing before Judge Steiner, were you, Mr. Case?

A. No, sir.

Q. Now you said you gave the bottle to Mr. Wells in the dining room. Was that after the capsules in the Ovaltine bottle had been counted or before then?

A. After, I believe. Just after it was counted.

Q. After that. What happened after you gave it to Mr. Wells, of course, you don't know? I say, what happened to the bottle after you gave it to Mr. Wells you don't know?

A. Yes, I know.

Q. Of your own knowledge?

A. Yes, of my own knowledge. You are speaking of at 803 Hausten Street?

Q. Yes, you gave this bottle to Mr. Wells in the dining room?

A. Yes, sir.

Q. Did he put it in his pocket?

A. No, sir.

Q. Put it in a bag?

A. I just handed it to him; he was standing right next to me—lifted the top off—

(Testimony of Roy F. Case.)

Q. Just answer my question. Don't be quick to volunteer information. Just answer my question.

You gave him the bottle? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Did you thereafter have it in your possession at [78] any time? A. Yes, sir.

Q. All right. Now, when did you have it in your possession after you had given it to him?

A. After I had given it to him, he turned right around and gave it back to me.

Q. He gave it back to you. Did you at any time thereafter give it to Mr. Wells again?

A. Yes.

Q. And when did you give it to him again?

A. In the Honolulu police station, vice room.

Q. At the Honolulu police station. And thereafter, what became of it you do not know?

A. I do not.

Q. Well, that is what I have been trying to get at. Was Mr. Kinney anywhere around there at the time? A. What time is that, sir?

Q. At the time that you found this bottle.

A. Yes, sir, he was in that portion of the wash room there. He stuck his head out of the window at the time I found it.

Q. Was he with you when you found this bottle?

A. No, sir, not right with me.

Q. Did he see the bottle drop from underneath the pillow? [79] A. I don't know.

Q. The reason I asked is because I notice he has his initials on this, too.

Mr. Landau: That is all.

The Court: Redirect?

Mr. Hoddick: No redirect.

The Court: Excused. Next witness.

(Witness excused.)

Mr. Hoddick: Francis Ferry.

The Court: I think we might just as well take our afternoon recess at this time, ten minutes.

(Recess had.)

FRANCIS C. FERRY

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Court: Will you please state your name.

The Witness: Francis C. Ferry.

The Court: Age?

The Witness: Thirty-one.

The Court: Residence?

The Witness: 2878 C Loi Street.

The Court: Honolulu?

The Witness: Honolulu.

The Court: It is very difficult to hear in this court room, and I feel sure you can speak good and loud all [80] of the time, so I won't have to remind you again.

What is your occupation?

The Witness: Police officer.

The Court: Employed by——

The Witness: Honolulu Police Department.

The Court: You are a citizen of the United States?

The Witness: I am.

The Court: Exclusively?

The Witness: I am.

The Court: Take the witness.

Direct Examination

By Mr. Hoddick:

Q. Mr. Ferry, how long have you been with the Honolulu Police Department?

A. About a year and approximately ten days.

Q. And during July of 1949 with what branch of the Honolulu Police Department were you serving?

A. With the vice division. In the vice division.

Q. Who was in charge of the vice division at that time?

A. Captain Whitford was in charge at that time.

Q. Do you know the defendant Winston Churchill Henry?

A. I do.

Q. Did you see him in July of 1949?

A. I did. [81]

Q. Did you see him at 803 Hausten Street?

A. I did.

Q. During July of 1949?

A. I did, yes, sir.

Q. Can you point out the defendant in the court room?

A. He is over there (indicating).

Q. How is he dressed?

A. With a maroon coat.

(Testimony of Francis C. Ferry.)

Mr. Hoddick: May the record show that the witness has identified the defendant.

The Court: Yes.

Q. (By Mr. Hoddick): About what time of day did you go to 803 Hausten Street?

A. I went there approximately, oh, I would say about ten to one.

Q. And where had you been before going there?

A. Before going there I was at Smith Street per instructions of Captain Whitford.

The Court: Excuse me. Is this morning or afternoon?

The Witness: This is the afternoon. When I went there on Smith Street was in the morning, and when I went there was in the afternoon, p.m.

Q. (By Mr. Hoddick): And why did you go to 803 Hausten Street? [82]

A. Per instructions of Captain Whitford to assist William Wells in the search for narcotics.

Q. Did anybody go to 803 Hausten Street with you?

A. Officer Harry Pestano was with me at the time when I went there.

Q. And how did you go?

A. He went in my car.

Q. After you arrived at 803 Hausten Street, did you participate in the search? A. I did.

Q. And where did you search?

A. I concentrated my search mostly in the rear of the rear apartment of 803.

(Testimony of Francis C. Ferry.)

Q. Now when you speak of rear apartment, what do you mean?

A. At 803 there is two apartments. There is one apartment in the front and one in the rear. The house that I searched was in the rear of 803. It was a stucco home, I think it was.

Q. Are these apartments separate houses?

A. They are separate houses.

The Court: Excuse me. I am going back. I just got that word. I thought he was giving the name of a family, but I understand from the interpretation by the Clerk that you were saying a "stucco home."

The Witness: A stucco, that is right.

Q. (By Mr. Hoddick): And you searched in the rear of this rear house?

A. That is right.

Q. The rear apartment?

A. That was the first place I started to search.

Q. And where did you look back there for narcotics?

A. Where did I look?

Q. Yes.

A. Well, when I first got in the back there, I went on the roof of the house, and I found nothing there, so I went down, I came down from the roof.

Q. Did you have any difficulty getting down from the roof?

A. A little. And I seen these canvas weather shelters. It was installed right on the outside of the window to the—I think it was the wash house. And when I looked up, I seen two big—a box and a brown package.

(Testimony of Francis C. Ferry.)

Q. In what direction do those windows face?

A. They face Waikiki of the house.

Q. Go ahead.

A. And Sergeant Kinney, who was in the near vicinity when I found—there was Sergeant Kinney and Captain Whitford, so I called Captain Whitford and I called Kinney and I said, “I think I got something here.” So Sergeant Kinney said, “Leave [84] it up there until we call Billy Wells.”

Q. Will you describe just where these packages were that you found.

A. It was—the packages—both packages were jammed between the screen and the canvas curtains.

Q. At the top or at the bottom?

A. At the very top, at the very top.

Q. What did you do after Kinney suggested that you call Wells?

A. Officer—I mean Mr. Wells and Mr. Henry there came over to the scene, and Mr. Wells told me to take it down. So I took the, I took the packages down and I handed it over to—I handed one package, the brown paper bag where they had bulk marijuana, or I suspected marijuana.

The Court: That may go out. The jury is instructed to disregard that. You took something down.

The Witness: I took something down.

The Court: Unless you positively know what it was, you are not allowed to testify as to what it was.

(Testimony of Francis C. Ferry.)

The Witness: I see.

The Court: You took a package.

The Witness: I took the two packages. There was a little square box and a brown paper bag.

Q. (By Mr. Hoddick): Mr. Ferry, did you look in the brown paper bag? [85] A. I did.

Q. Can you describe the contents without giving your conclusions as to what the contents were?

A. It looked like tea in one and the other one was rolled cigarettes in brown durham paper—I mean, that is brown wheat paper.

Q. What did you do with this package and this box after you took them down from behind the canvas curtains?

A. We all walked towards the cement patio and I handed the brown paper bag to Mr. Wells, and Mr. Wells examined it. Then he handed me the brown paper bag and I handed him the paper box. And Mr. Wells looked at the box and he counted the rolled contents in this wheat paper, brown wheat paper.

Q. How many of these brown cigarettes were there in that box? A. Twenty-nine.

Q. And then did he return the box to you?

A. He returned the box and he said to hold it.

Q. Was Mr. Henry present at the time you took down the box and the paper bag? A. He was.

Q. Was he there at the time the cigarettes were counted? A. Yes, sir.

Q. Did he say anything at that time?

(Testimony of Francis C. Ferry.)

A. No, sir. [86]

Q. What did you do with the box and the paper bag after it was returned to you by Mr. Wells?

A. Mr. Wells told me to carry it into the—whatever would you call that—something like a dining room like right next to the kitchen. It was the same room, and there was a big table there where we had everything, and I handed it over to Lieutenant Fraga for any fingerprints.

Q. Did he test this paper bag and the box in your presence? A. He did.

Q. And were you there all the time he made the test? A. I was.

Q. Did he return them to you?

A. He returned it back to me.

Q. What did you do?

A. Then I turned it over to—I signed it. Mr. Wells told me to initial it and put the date and time on it. I handed it over to Mr. Wells.

Q. When you say “it,” are you referring to both packages? A. Yes, sir, I am.

Q. Did you put your initials on both packages?

A. I did.

Mr. Hoddick: May I have a paper box which has the name “New Drene Shampoo” printed on it marked for identification [87] purposes.

The Court: Yes.

The Clerk: United States Exhibit No. 6.

The Court: For identification.

The Clerk: For identification.

(Testimony of Francis C. Ferry.)

(Thereupon the article above-referred to was marked United States Exhibit No. 6, for identification.)

Mr. Hoddick: May I also have marked for identification purposes a brown paper bag with a rubber band around it.

The Court: Yes.

The Clerk: United States Exhibit 7 for identification.

(Thereupon the article above-referred to was marked United States Exhibit No. 7, for identification.)

Q. (By Mr. Hoddick): Mr. Ferry, showing you United States Exhibit No. 6 for identification purposes, I ask you if you can identify that box.

A. I can.

Q. And what is it?

A. That is the same box that I found under the eaves.

Q. Now how can you tell?

A. Well, I remember the box and I have my initials on the box.

Q. Can you find your initials there?

A. Yes, I can. It is right here, "FCF." [88]

Q. Would you look at the contents of that box and tell me whether those contents appear to you the same as when you found it? A. Yes, it is.

Q. I hand you United States Exhibit No. 7 for identification purposes and ask you if you can identify that exhibit? A. I can.

(Testimony of Francis C. Ferry.)

Q. Will you please identify it?

A. Right here (indicating), "FCF." I put my initials on the package.

Q. Now what is that exhibit—now wait. Is that the exhibit that you found between the curtain and the screen?

A. That's right, it is.

Q. At 803 Hausten Street?

A. That's right, it is.

Q. From the time that you found United States Exhibit No. 6 for identification purposes and United States Exhibit No. 7 for identification purposes until the time that you turned them over——

Mr. Hoddick: I will withdraw that question.

Q. (By Mr. Hoddick): After you had initialed it, what did you do with those two exhibits?

A. I turned it over to Mr. Wells.

Q. And where did you do that?

A. I did that in the dining room in this, well, it is— [89] I don't know whether you call it a dining room or not. It is in the same, it is just in the rear of the kitchen. I think it is a dining room, you would call that a dining room, the rear room of the kitchen.

Q. Was Mr. Henry present at that time?

A. He was.

Q. From the time that you found United States Exhibit No. 6 for identification purposes and United States Exhibit No. 7 for identification purposes until the time that you turned them over to Mr. Wells, was there any change in their condition or in

(Testimony of Francis C. Ferry.)

the condition of their contents? A. No, sir.

Q. Did you continue searching the premises?

A. I did.

Q. Was anything further found in your presence?

A. Yes, as soon as I turned the marijuana over—Excuse me—the two contents over to Mr. Wells, I immediately proceeded in the parlor, and there was a large buffet.

The Court: All right, stop there. The reference to marijuana is stricken and the jury is instructed to disregard it. You corrected yourself, but nevertheless I have to strike it out clearly. All right.

The Witness: Then I assisted Officer Shaffer and Harry Pestano, who were lifting the cushions of the buffet—I mean sofa, rather. I think it was a sofa or something, and [90] we lifted up the cushions, and Harry Pestano discovered some more cigarettes rolled up in loose paper, durham paper, I guess it is, white paper.

Q. (By Mr. Hoddick): What color was the paper?

A. I think it was brown, or white. I am not too sure now.

Q. And do you remember how many were found under that cushion? A. I think it was six.

Q. Did you place any identifying marks on those six cigarettes? A. I did.

Q. What were the marks that you put on them?

A. "FCF."

(Testimony of Francis C. Ferry.)

Q. Now, during the time that you were at 803 Hausten Street, Mr. Ferry, did you hear the defendant say anything?

A. Well, when I went back in to bring the two contents over to Lieutenant Fraga, Mr. Wells was at that time testing the white powdered substance in the bottle that was discovered by Mr. Case, and if I remember correctly, the defendant, when Mr. Wells tasted some of it and rubbed it on his tongue, Mr. Henry said something, "You know better than that. That's dynamite," or something, words to that extent.

Q. Did you hear him say anything else during the course of the search? [91]

A. Mr. Wells said, "There is about 200 grains of something in there," and Mr. Henry said, "More than that," or something like that.

Q. Did you hear the defendant say anything to anyone other than Mr. Wells?

A. I don't know. I don't believe I can remember that.

Q. Did you hear the defendant say anything to a Mrs. Thomas who was there?

A. Oh, yes, he said something like, "You don't have to answer any questions," or something like that. Or, "Don't answer them," or something like that, in that extent. So Mr. Wells said, "Well, I can ask her her age, can't I?" To that extent.

Q. Did you see what Mr. Pestano did with the six cigarettes that were found under the couch pillow inside the house?

(Testimony of Francis C. Ferry.)

A. Well, when he gathered the six, I immediately assisted Sergeant Sousa in searching about three drawers that were built in the—I think it was built in the house, into the wall, if I am not mistaken.

Q. Mr. Ferry, I asked you if you saw what Mr. Pestano did with the six cigarettes that you found under the pillow on the couch.

A. No, I didn't.

Q. You did not. [92]

Mr. Hoddick: No further questions.

The Court: Cross-examination.

Cross-Examination

By Mr. Landau:

Q. Was Mr. Henry handcuffed to Mr. Wells all this time, Mr. Ferry? A. No, sir, he was not.

Q. You knew he was under arrest?

A. I knew he was under arrest.

Q. And therefore he was obliged to go along with Mr. Wells wherever Mr. Wells went.

A. That's right.

Q. Isn't that correct? A. Yes.

Q. And that is the reason he was with Mr. Wells whenever Mr. Wells went where somebody called him? A. That's right.

Q. You are another witness that was kept on the rack by Mr. Hoddick and didn't testify down before the Commissioner; isn't that correct?

Mr. Hoddick: Objection, your Honor. It is not

(Testimony of Francis C. Ferry.)

proper cross-examination and it is entirely immaterial.

The Court: It is argumentive. Sustained.

Q. (By Mr. Landau): Well, as a matter of fact, you didn't testify before the United States Commissioner? [93]

Mr. Hoddick: Objection on the same grounds.

The Court: Did not testify?

Mr. Landau: He did not testify.

The Court: Overruled.

Q. (By Mr. Landau): Is that correct? In this particular case.

A. I am trying to recall now. I don't recall.

The Court: Speak up loud so I can hear you.

Q. (By Mr. Landau): As a matter of fact, you as a police officer know that a person who is under arrest doesn't have to answer any questions; isn't that correct, Mr. Ferry? A. That's right.

Q. And at that time Miss Thomas was under arrest, wasn't she?

A. No, she was not, sir, not as far as I was concerned.

Q. Well, it is not a question of whether you were concerned. Do you know whether she was under arrest? A. She was not under arrest.

Q. You are sure of that?

A. I am sure, positive.

Q. But Henry was?

A. Henry was under arrest.

(Testimony of Francis C. Ferry.)

Q. Now, Miss Thomas was brought down to the police station, wasn't she?

A. I think she was. [94]

Q. And, as a matter of fact, she was brought to the vice room and examined, questioned?

A. You see, at this time here, I drove the other minor children to the home of—I mean to the home of Bernice Black, I think it is, and I didn't go to the station until some time after.

Q. Did you see Helen Thomas there when you got there?

A. I may have seen her when I got there.

Q. And wasn't Miss Thomas also charged with an offense at that time, Mr. Ferry?

A. If she was, I didn't know nothing about it.

Q. Did you ever find out that she was at that time charged with an offense?

A. No, sir, I didn't.

Q. Well, don't you know that she was charged with this offense? A. I don't.

Q. With the possession of these alleged narcotics? A. I don't.

The Court: What narcotics?

Mr. Landau: I didn't hear the Court.

The Court: You said: Do you know whether or not Miss Thomas was charged with the offense of possessing these narcotics? What narcotics?

Mr. Landau: I said "alleged narcotics." [95]

The Court: Are you sure?

Mr. Landau: What?

(Testimony of Francis C. Ferry.)

The Court: In any event, there is no evidence that we have any narcotics here.

Mr. Landau: No, I mean alleged narcotics. It is alleged in the indictment, if the Court pleases.

Q. (By Mr. Landau): You had no information, of course, that there was anything hidden between the screen and the canvas weather shutters?

A. No, I didn't have any intimation.

Q. And you were just making a cursory look around; isn't that right?

A. That's right. I was just looking around the premises in the systematic search that we——

Q. I take it from your description you looked around and there they were.

A. No, sir, I don't know what made me look under there, but anyway I lifted up the curtains and I looked upwards, because I was looking at every nook and corner before that anyway.

Q. Well, anyway, merely by lifting the canvas shelter away, you looked up and there it was.

A. That's right, plain in view.

The Court: I can't determine whether this is inside a building or outside a building. [96]

The Witness: No, sir, this is the outside of the building in the rear of the house.

Mr. Landau: He testified it was an outside weather canvas shelter.

The Court: Was it an awning?

The Witness: It was sort of like a weather awning, only it went straight down instead of braced up.

(Testimony of Francis C. Ferry.)

The Court: Sort of like a shade?

The Witness: Sort of like a shade.

Q. (By Mr. Landau): Except it was on the outside of a screen instead of on the inside?

A. That's right.

Q. Do you know whether some of the officers who had got there earlier than you, had walked through the same area that you had walked through?

A. Perhaps. I wouldn't deny that. Perhaps they did, because I have no knowledge of that.

Q. As a matter of fact, when you got there, the search was under way, vigorously, by everybody, wasn't it?

A. That's right.

Q. And also, as a matter of fact, as soon as you got to the premises, you started to search without getting any instructions from anybody?

A. No, sir, I reported straight to Lieutenant—I mean Captain Whitford and Mr. Wells. [97]

Q. Then were you left on your own devices, or did they direct you where to go?

A. I think Sergeant Kinney directed me to concentrate my search in the rear of the building.

Q. And Sergeant Kinney was one of the two officers who happened to be near by you when you saw those two packages?

A. That is right, very correct.

Q. Now were you there when the other officers, Case and Sasaki, yielded possession of these bottles to Mr. Wells?

A. I was there when—I think I was there just

(Testimony of Francis C. Ferry.)

a little after they had turned over the bottles to him.

Q. Did they, in your presence, ever get those bottles back, or did they remain in Mr. Wells possession?

A. I wouldn't—I wouldn't know. I don't think it was done in front of my presence, because as soon as my work was finished, I mean, my duty was finished, I went right away out to assist Officer Pestano and Shaffer.

Q. Do you know whether Lieutenant Fraga lifted any fingerprints from these two articles that you found? A. I don't believe he did.

Q. You saw him dusting it?

A. That's right, I did.

Q. Did the buffet that you mentioned and then forgot about have anything to do with the search in the dining room or the living room? [98]

A. Did it have anything to do with it?

Q. You mentioned something about lifting a buffet.

A. Not a buffet. I meant to say sort of a couch like.

Q. Couch?

A. Yes, large pillows, about three pillows in a couch.

Q. And I take it Pestano was just pushing the pillows away and there were these articles which you have described.

A. No, sir, we were lifting it up. I lifted one big pillow, one big cushion, rather, and Pestano

(Testimony of Francis C. Ferry.)

lifted the other cushion. We just lifted it up like that.

Q. These were fitted cushions? A. Yes.

Q. Not scatter cushions?

A. No, fitted cushions.

Q. What kind of a frame was it, do you know?
Was it a rattan frame, do you know?

A. No, it was not a rattan frame. I think it was the other type.

Q. But it was easy enough to pull the pillows up?

A. Very easy, yes, sir.

Q. And when you pulled the pillows up, there were these articles which you have described?

A. That's right.

Mr. Landau: I think that is all.

The Court: Redirect. [99]

Redirect Examination

By Mr Hoddick:

Q. Mr. Ferry, did you see Miss Thomas, or Mrs. Thomas, when you first arrived at the premises?

A. I did.

Q. Was she with you when you went outside and continued the search?

A. No, sir, she was not.

Q. Were there some periods of time while you were there during which Mrs. Thomas was out of your sight? A. Yes, sir.

Q. Is it possible that during those periods Mrs. Thomas might have been arrested?

(Testimony of Francis C. Ferry.)

A. It is possible. I have no knowledge of it, though.

Mr. Hoddick: No further questions.

Mr. Landau: No further questions.

The Court: Excused.

(Witness excused.)

The Court: Next witness.

Mr. Hoddick: Officer Harry Pestano.

HARRY L. PESTANO

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Court: What is your name?

The Witness: Harry L. Pestano. [100]

The Court: How old are you?

The Witness: Twenty-six.

The Court: Do you live in Honolulu?

The Witness: Yes, sir.

The Court: By whom are you employed?

The Witness: Honolulu Police Department.

The Court: Are you a citizen of the United States?

The Witness: Yes, sir.

The Court: Only?

The Witness: Yes, sir.

The Court: Take the witness.

(Testimony of Harry L. Pestano.)

Direct Examination

By Mr. Hoddick:

Q. Mr. Pestano, how long have you been with the Honolulu Police Department?

A. Two years.

Q. And during July of 1949 with what branch of the Police Department were you serving?

A. I was in the vice division.

Q. Who was in charge of the vice division at that time? A. Captain Whitford.

Q. Do you know the defendant, Winston Churchill Henry?

A. Yes, sitting over there. Far end of the table.

Q. Far end of the table. Will you describe the color of the jacket he has on? [101]

A. Maroon.

Mr. Hoddick: May the record show that Officer Pestano has identified the defendant, please.

The Court: Yes.

Q. (By Mr. Hoddick): Did you have occasion to go to 803 Hausten Street on July 16, 1949?

A. Yes, sir.

Q. Did you see the defendant there at that time?

A. Yes, I did.

Q. Where had you been prior to going to 803 Hausten Street?

A. I was on Smith Street.

Q. Were you with somebody on Smith Street?

A. Yes, Officer Ferry and myself.

(Testimony of Harry L. Pestano.)

Q. And why did you go to 803 Hausten Street?

A. Per orders of Captain Whitford we were to patrol Smith Street to see the whereabouts of the defendant.

Q. I said, Why did you go to 803 Hausten Street?

A. Hausten Street. To assist in the raid that was planned by Agent Wells and Captain Whitford.

Q. To assist whom? A. Agent Wells.

Q. About what time did you get to 803 Hausten Street? A. About 12:50 or 12:55 p.m.

Q. And did you assist in the search of the premises? [102] A. Yes, I did.

Q. Would you describe the premises at 803 Hausten Street?

A. 803, the place we searched, was located in the back portion of that particular address. There is another house in the front. It is an up and down—two-story building.

Q. Is there anything that separates the front house from the rear house?

A. A bridge, call it a river, stream.

Q. Did you start to search the premises when you arrived there?

A. As soon as I arrived, we waited for orders as what we should do, orders from Captain Whitford and Agent Wells, we were to search the premises for narcotics.

Q. Where did you search?

A. I searched on the grounds.

(Testimony of Harry L. Pestano.)

Q. Pardon?

A. I searched on the grounds in the immediate vicinity of the place, and in the house as well.

Q. What part of the interior of the house did you search?

A. I searched the living room and the couch.

Q. And in searching the living room, did you find anything unusual?

A. Yes, I found, after lifting up the cushion from the couch, I found—— [103]

Q. Just one second. Don't say anything as to what you thought it was you found.

A. I found six suspected marijuana cigarettes.

The Court: That may go out. The jury is instructed to disregard it.

Now, if you have any more witnesses, I want you to tell them before they get in here. I don't want this to happen again.

Mr. Hoddick: Yes, your Honor.

The Court: You can only testify as to what you know positively of your own knowledge. Until you are qualified to state as an expert what the contents of these things were, we cannot accept your expression of opinion that it was marijuana that these cigarettes that you found contained. Therefore, that statement by you as to what the cigarettes contained is tricken and the jury is instructed to disregard it completely and entirely. All right, let's go back and start over again.

Q. (By Mr. Hoddick): Where did you search

(Testimony of Harry L. Pestano.)

in the interior of the house? A. Living room.

Q. And did you find anything unusual in your search of the living room? Just answer that "yes" or "no." A. Yes.

Q. Will you describe the physical appearance of what [104] you found.

A. I found—well, it is like cigarettes where they roll it in durham paper, brown paper.

Q. And where did you find these things which looked like cigarettes?

A. Underneath the cushion of the couch.

Q. And how many did you find? A. Six.

Mr. Hoddick: May I have marked for identification purposes a United States Treasury Department Envelope?

The Court: Yes.

Mr. Hoddick: And a small package wrapped in cellophane?

The Clerk: United States Exhibit No. 8 and United States Exhibit No. 9, for identification.

The Court: Very well.

(Thereupon, the documents above referred to were marked U. S. Exhibit No. 8 and U. S. Exhibit No. 9, for identification.)

Q. (By Mr. Hoddick): What did you do with these six cigarettes that you found under the cushion on the couch?

A. At first I didn't touch it. We were instructed to notify Agent Wells as soon as we picked up anything that we suspect to be the cause of the raid,

(Testimony of Harry L. Pestano.)

and as soon as I saw what seems to be cigarettes, I called Agent Wells to the scene, in which he in turn called the defendant. [105]

Q. Before the cigarettes were picked up, were both Mr. Wells and Mr. Henry on the scene?

A. Yes.

Q. And what did you do with these cigarettes?

A. Per orders from Agent Wells, told me to pick it up, I did; I picked it up and I took off the cellophane wrapper from my cigarettes and put all six of them in.

Q. And then what did you do with them?

A. I held it until we got back to the vice room. At the vice room I myself put my initial on it.

Q. Did anybody else put his initials on the cigarettes in your presence? A. Yes, sir.

Q. Where did you put your initials?

A. On the cigarette.

Q. Not on the cellophane?

A. Not on the cellophane.

Q. Who else initialed it?

A. Paul Shaffer and Officer Ferry, I believe.

Q. What did you do with the cigarettes after they had been initialed?

A. Turned it over to Agent Wells.

Mr. Landau: I didn't get the answer.

The Witness: I turned it over to Agent Wells.

Q. (By Mr. Hoddick): From the time that you found these [106] six cigarettes under the sofa cushion until the time you gave them to Mr. Wells

(Testimony of Harry L. Pestano.)

down at the vice squad office, was there any change in the condition of those cigarettes?

A. Not to my knowledge.

Q. They were in your possession that entire time, were they not? A. Yes, sir, yes, they were.

Q. Did anybody else have any access to them?

A. No, sir.

Q. Did you change the condition of those cigarettes from the time you found them until the time you gave them to Mr. Wells?

A. No, sir.

Q. I ask you to open carefully U. S. Exhibit No. 8 for identification purposes along this edge. Tear it off from the end, examine the contents, and tell me if you can identify it. A. Yes, sir.

Q. What are they?

A. That is the same things I picked up under the cushion.

Q. How many are there? A. Three.

Q. Now, I would like you to put those back in that envelope. Do your initials appear on those three?

A. Yes, sir (returning to envelope). [107]

Q. Unwrap U. S. Exhibit No. 9 for identification purposes and tell me whether you can identify the contents.

A. Yes, these are the same six, together with these.

Q. These are also three of the cigarettes you found under the cushion on the couch at 803 Haus-ten Street? A. Yes, sir.

(Testimony of Harry L. Pestano.)

The Court: Under the couch?

Mr. Hoddick: Under the cushion on the couch.

The Court: Which is it?

The Witness: Under the cushion.

Q. (By Mr. Hoddick): Do your initials also appear on those last three cigarettes?

A. My initials appear on all of them.

Q. During the time that you were in the presence of Mr. Henry, the defendant, while the search was being conducted and thereafter, did the defendant say anything?

A. All I heard him say was, he was talking to the woman Helen Thomas, not to say anything. That is all.

Mr. Hoddick: No further questions.

The Court: Cross-examination.

Cross-Examination

By Mr. Soares:

Q. Pestano, when did you first know you were going to have a part in this raid?

A. It was the day before the raid took place.

Q. And did you receive specific instructions at that time?

A. Yes, I did.

Q. From whom did you receive instructions?

A. Captain Whitford.

Q. Was anyone else present?

A. Yes, Agent Wells.

Q. Did he have any part in giving instructions?

A. No, not to me.

(Testimony of Harry L. Pestano.)

Q. Well, did he talk to Whitford and then Whitford talk to you?

A. I can't say if he did talk to Whitford, but Captain Whitford did talk to me.

Q. While you were receiving your instructions from Captain Whitford in the presence of Wells, Wells never opened his mouth?

A. Not in front of me, no, sir.

Q. And you say that was the day before the actual raid? A. Yes.

Q. On that day that you refer to, did you know the raid was going to take place the next day?

A. No, I didn't.

Q. The time for the raid had not been fixed then? A. No, sir.

Q. You did receive instructions but not any instructions [109] as to when the raid was to take place? A. That's right.

Q. When did you first know when the raid was to take place? A. The day before the raid.

Q. With relation to the time you received these instructions, when did you know the raid was to take place the next day?

A. I beg your pardon?

Mr. Soares: Read the question.

(Question read.)

A. When I was instructed the day before. That is all.

Q. I thought you said you were not told the day before when the raid was to take place.

(Testimony of Harry L. Pestano.)

A. I was told by Captain Whitford the day before the raid took place as to instructions as to a raid to be carried out.

Q. But were you told the raid was going to be held the next day? A. No, sir.

Q. Now, I want to know when you first learned that the raid was going to be held on the day it was held. A. About six o'clock that morning.

Q. The morning of that day?

A. Yes, sir. [110]

Q. And from whom did you hear that?

A. From Captain Whitford and Sergeant Sousa and Seargeant Sasaki.

Q. Was Mr. Wells present?

A. At six o'clock, no.

Q. And what was the first thing you were expected to do in connection with this raid?

A. Myself, Officer Paul Shaffer, Officer Ferry, and Officer Marcotte were to be stationed at the Drier Manor.

Q. Did I understand you to say something in your direct examination about Smith Street?

A. Yes.

Q. Did you receive some instructions with reference to that? A. Yes, sir.

Q. Well, when did you go to Smith Street? Before you went to Drier Manor or after?

A. After.

Q. And what was your purpose in going to Smith Street?

(Testimony of Harry L. Pestano.)

A. To locate the whereabouts of the defendant.

Q. He has a place of business on Smith Street,
I think. A. I believe so.

Q. A restaurant? A. I believe so. [111]

Q. You knew where that was?

A. Yes, I did.

Q. Who told you to go there and locate the
defendant? A. Captain Whitford.

Q. Was anybody else to accompany you?

A. Officer Ferry.

Q. So far as you know, while you were at Drier
Manor the whereabouts of the defendant were un-
known? A. Yes, sir.

Q. Is that right? A. Unknown to me.

Q. What is that?

A. He whereabouts were unknown to me.

Q. And did the others also indicate that they
didn't know where he was?

A. Officer Ferry didn't. He and I was the only
ones that didn't know.

Q. And you and Ferry were told to go to Smith
Street and locate the defendant? A. Yes, sir.

Q. And did you receive instructions what you
were to do if you did locate the defendant on Smith
Street?

A. I did not receive instructions as to what to
do. Officer Ferry did.

Q. Well, did you hear the instructions given?

A. No, sir.

Q. So you didn't know what you were supposed

(Testimony of Harry L. Pestano.)

to do after you got to Smith Street and located the defendant; is that right?

A. Locate his whereabouts, yes, sir.

Q. You didn't know what you were supposed to do after having found out where he was?

A. I was told if I was——

Mr. Hoddick: Just a second. That would be hearsay on the part of this witness. Object to the question.

Mr. Soares: You mean you don't want us to go into his instructions with reference to this raid?

Mr. Hoddick: I think it is immaterial and going pretty far afield.

The Court: The objection is based on hearsay. Is there any hearsay?

Mr. Hoddick: Excuse me. I misunderstood the question.

The Court: You may answer the question.

Q. (By Mr. Soares): Is that correct?

A. I beg your pardon? May I hear the question again?

(Question read.)

A. I did.

Q. Well, what were you supposed to do after you found where the defendant was on Smith Street? [113]

A. I was to let Officer Ferry know.

Q. And who found the defendant on Smith Street, you or Ferry? A. Nobody did.

(Testimony of Harry L. Pestano.)

Q. He was not there?

A. He was not there.

Q. Where did you look for him?

A. Smith Street.

Q. And where on Smith Street?

A. Between Pauahi Street and Beretania Street.

Q. Did you go into his place of business?

A. No.

Q. You knew where his place of business was?

A. Yes.

Q. You had been sent to locate him?

A. Yes.

Q. But you didn't go into his place of business and inquire whether he was there or not?

A. No.

Q. What was the reason you didn't do that?

A. The reason was that we were not to be suspicious of the whereabouts of the defendant to the rest of the people.

Q. You knew in advance of this raid, did you not, that they were out to get Henry, that he is the man they wanted?

A. I did the day before, yes. [114]

Q. And isn't it a fact, Pestano, that you were supposed to go down to Smith Street and if he were there and left the place, to tip the officers off that he had left Smith Street; isn't that what you were supposed to do?

A. I am an officer myself.

(Testimony of Harry L. Pestano.)

Q. Will you answer my question, please. I didn't ask you whether you were an officer yourself or not. That had nothing to do with the question.

A. I was to let Officer Ferry know.

The Court: There is an implication in your question that he isn't a police officer and that he was going to tip the officers off. That's why he said that. He is a police officer and he got an inference from your question that you didn't appreciate that he was a police officer.

Mr. Soares: Well, I will reframe the question, then, so there won't be any misunderstanding of my knowledge of your being a police officer.

Q. (By Mr. Soares): Weren't you supposed to go down to Smith Street and tip the police officers off at Drier Manor if the defendant left Smith Street?

A. Not at Drier Manor, no. I was supposed to let Officer Ferry know.

Q. Well, Ferry was with you, wasn't he?

A. Yes, he was.

Q. What? [115]

A. He was on his own route. I was on my own. I was supposed to have Smith Street.

Q. Oh, your specific instruction was to tell Ferry what you found? A. Yes.

Q. Did you hear any instructions given to Ferry as to what he was to do? A. No, sir.

The Court: Ferry.

Mr. Soares: Ferry. I am sorry.

(Testimony of Harry L. Pestano.)

Q. (By Mr. Soares): Your answer is "no"?

A. No, sir.

Q. You did not see the defendant?

A. I did not.

Q. That is, on Smith Street?

A. Yes, I did not see him on Smith Street.

The Court: Please keep your voice up so we can hear you.

What was that answer?

The Witness: I did not see the defendant on Smith Street.

Q. (By Mr. Soares): You did not see him on the day of the raid——

Mr. Soares: Withdraw that.

Q. (By Mr. Soares): You did see him on the day of the [116] raid though, or the night of the raid? A. At the place, yes, I did see him.

Q. That is, 803 Hausten Street?

A. Yes, sir.

Q. Well, how did you come to go out to Hausten Street?

A. With Officer Ferry. Officer Ferry has his own car, and from Smith Street——

Mr. Soares: Please speak up.

A. (Continuing): Officer Ferry has his own car, so from Smith Street we proceeded to 803 Hausten Street.

Q. Why did you give up the attempt to locate Henry?

A. We didn't give up. We called in for further

(Testimony of Harry L. Pestano.)

instructions as to what to do, so in the meantime we were told to come back over to 803 Hausten Street.

Q. How long were you in the attempt to locate the defendant on Smith Street?

A. I would say about fifteen to about half an hour.

Q. After half an hour you called up and said you couldn't locate him?

A. I didn't call them. Officer Ferry did.

Q. In your presence? A. Yes, sir.

Q. And then you got instructions from Ferry to accompany him back? A. Yes, sir. [117]

Q. To 803 Hausten Street.

Mr. Soares: Will your Honor pardon me a minute.

Mr. Landau: I notice it is four o'clock. I was wondering if we would finish with this witness.

The Court: I don't know either. You said "back to Hausten Street" in your last question.

Mr. Soares: I didn't mean to infer he had already been to Hausten Street.

The Court: Very well.

Mr. Soares: It is like saying "back yonder."

The Court: Under the same admonition I have given the jury at the outset, namely, that they are not to discuss this case with anyone or to read newspaper articles concerning this case, or to listen to other people discuss this case, or to listen to radio commentators discuss this case or report news-wise

(Testimony of Harry L. Pestano.)

upon this case, we will stand adjourned at this time until 10 o'clock tomorrow morning.

(Thereupon, at 4:00 p.m. an adjournment was taken until 10:00 a.m. the following morning, January 6, 1950.) [118]

January 6, 1950

(The Court convened at 10:00 a.m.)

The Clerk: Criminal No. 10,253, United States of America, Plaintiff, versus Winston Churchill Henry, Defendant; case called for further trial.

The Court: Are the parties ready?

Mr. Soares: Ready for the Defendant.

Mr. Hoddick: Ready for the Plaintiff.

The Court: Note the presence of the Jury and the Defendant together with his attorneys.

HARRY L. PESTANO

a witness in behalf of the Plaintiff, having previously been sworn, resumed and testified further as follows:

Cross-Examination

(Continued)

The Court: You are Mr. Pestano?

The Witness: Yes.

The Court: I remind you that you are still under oath and under cross-examination. You may continue.

(Testimony of Harry L. Pestano.)

By Mr. Soares:

Q. Mr. Pestano, did I understand correctly yesterday you testified that these cigarettes so-called are in the same shape that they were when you found them?

A. Yes, with the exception of my signature.

Q. Well, I mean the cigarettes, the cigarette itself. I don't mean the stuff that is written.

A. Yes, sir.

Q. And when did you say you put your initials on it?

A. About two or two and one-half hours after the raid.

Q. And were you the first one to put initials on the cigarette?

A. On the ones I found, yes, sir.

Q. And which did you find—how many?

A. Six.

Q. Under the cushion?

A. Of the sofa, yes.

Q. Sofa? Did you find any other of the exhibits in this case? A. No, sir.

Q. Was this raid that you were part of in July the first raid that you knew of being planned against these premises at 803 Hausten Street?

A. Yes, sir.

Q. You knew nothing about the plans for an earlier raid? A. No, sir.

Q. How long did you say you had been on the vice squad? A. A year and one-half.

(Testimony of Harry L. Pestano.)

Q. Were you at all familiar with these premises prior [120] to your going out there on this date in July?

A. No, sir. That is the first time I had been there.

Q. You hadn't been briefed on them in connection with your position on the vice division? You say they never briefed you about these being premises being suspected of any law violations?

A. Well, I was told as to the address. But as to the premises I had no way——

Q. That is, you had been told that 803 Hausten Street, that it was under police suspicion?

A. Yes.

Q. As a matter of fact, they tell all the vice men the different places in town——

Mr. Hoddick: I object. I don't think that has any bearing on this case, your Honor.

Mr. Soares: Cross-examining the witness.

Mr. Hoddick: I don't know what you are doing, Mr. Soares.

The Court: Well, true, you are entitled to a wide range on cross-examination. I can't particularly see any relevancy, but he may answer the question nevertheless.

Mr. Hoddick: Answer the question, please.

The Witness: The question again?

Q. (By Mr. Soares): They tell the vice men the different places in town that are under police suspicion? [121]

(Testimony of Harry L. Pestano.)

A. Just that particular place that's going to be raided, that's all.

Q. Well, I won't pursue it in view of the Court—at any rate, you have never heard anything wrong with 803 Hausten Street until just prior to the raid?

A. The day before, yes.

Q. Up to that time it had not be discussed in your hearing?

A. No, sir.

Q. This sofa, as you call it, was in what room?

A. It is, I believe, it is in the living room.

Q. And what other furniture was in the living room?

A. There was an easy chair, that sofa; I believe there was a table, but it was in an adjacent room.

Q. But I mean in that room.

A. That's all I can remember.

Q. This sofa and an easy chair?

A. Yes.

Q. When you came into that room was anybody with you?

A. Everyone participated in the raid, with the Defendant and some people he had was in the room at the same time.

Q. But I mean, did they come in with you?

A. Officer Ferry and myself came in at the same time.

Q. But when you came in there was no one in the room? [122]

A. There was.

Q. Who was in the room when you came in?

A. Mrs. Thomas and her sister and Mrs. Thomas' daughter, a Mr. Montgomery and Sergeant Sasaki,

(Testimony of Harry L. Pestano.)

Officer Marcotte, Officer Shaffer and Officer Ferry.

Q. Were they all standing up or some of them seated? A. Some of them were seated.

Q. And can you tell us who was seated and where they were seated? I am talking about the living room only.

A. Mrs. Thomas, her sister and her daughter were sitting on the sofa. Mr. Montgomery was sitting on an easy chair.

Q. The rest were standing around?

A. Yes.

Q. And did you require Mrs. Thomas and her sister and daughter to get off the sofa?

A. I didn't do that but I believe one of the officers did.

Q. Do you know who it was?

A. No, sir, I can't recall.

Q. You do know that somebody ordered them off the sofa? A. Yes, sir.

Q. And it wasn't you? A. No, sir.

Q. Nevertheless you were the one who searched the sofa? A. Yes, sir. [123]

Q. Although somebody else had ordered them off? A. Yes.

Q. Had you received orders to search that particular sofa? A. Yes.

Q. Who gave you those orders?

A. Captain Whitford and Sergeant Sasaki at that time.

Q. Both of them? A. Yes.

(Testimony of Harry L. Pestano.)

Q. They are both your superior officers, weren't they? A. Yes.

Q. And I believe you said that when you got in the room Sasaki and Whitford were among those that were already in the room.

A. I don't believe I mentioned Captain Whitford, but Sergeant Sasaki was there.

Q. Had Captain Whitford been in the room before you went in?

A. That I don't know but after I was there he came in.

Q. You don't know at what point he arrived, is that it? A. No, sir.

Q. Sasaki was there, however?

A. Yes, sir.

Q. Did Sasaki have anything in his hands at that time? [124] A. At that time, no.

Q. Did you ever see him with something in his hand? A. Yes.

Q. What was it? A. He had that bottle.

Q. He acquired that after you found the cigarettes in the sofa?

A. My cigarettes was the last item that was found.

Q. Are you sure of that?

A. I believe mine was the last.

Q. Well, then, who had this bottle?

A. Sasaki had it.

Q. I thought you said he didn't have it until afterwards.

A. He had it before I found my cigarettes, yes.

(Testimony of Harry L. Pestano.)

The Court: Which bottle are you both talking about?

The Witness: The large.

Mr. Soares: It is U. S. Exhibit 1, the Ovaltine bottle.

The Court: Is that the one you are talking about?

The Witness: Yes.

Q. When you came into the living room, as you call it, Sasaki was in there? A. Yes.

Q. But he did not have this bottle in his hands?

A. No, sir, I believe it was on the table with Agent [125] Wells.

Q. Did you ever see what was in that bottle, Exhibit 1, the Ovaltine bottle? A. Yes, I did.

Q. Was that while they were counting the capsules? A. Yes, sir.

Q. And when did that take place with relation to the time you found the cigarettes, before or after?

A. After.

Q. And where did you first see this bottle, Exhibit 1, the first time you ever saw it?

A. Sergeant Sasaki had it in his hand.

Q. When you first saw it Sasaki had it in his hand? A. Yes, sir.

Q. But when you first saw Sasaki he did not have it in his hand? A. No, sir.

Q. And where did he get it from, did you see?

A. No.

Q. Well, did he leave the room and come back with the bottle? A. Yes.

(Testimony of Harry L. Pestano.)

Q. Or was he there all the time you were there?

A. He left the room.

Q. Alone? [126]

A. I believe he did. I can't recall if he left alone.

Q. Did anybody give him any orders that caused him to leave the room?

A. I can't recall. I was busy myself.

Q. Well, you have received orders to search the couch?

A. Yes.

Q. And you got those orders from Sasaki?

A. Yes.

Q. Now, did he give you those orders before he left the room or after he came back?

A. Before he left the room.

Q. And just what did he say to you in that connection?

A. Well, he pointed out the officers to search the chairs.

Q. Well, what did he say to you?

A. He pointed out the sofa.

Q. Pointed at you and said, "Search the sofa"?

A. Yes.

Q. What orders did Whitford give?

A. Same thing.

Q. Do you know any reason why it was necessary for both of them to give you such a simple order as that?

Mr. Hoddick: Objection. It calls for a conclusion on the part of the witness.

(Testimony of Harry L. Pestano.)

Mr. Soares: I asked him if he knew. I am not asking [127] to advance——

The Court: Overruled.

Q. Do you know any reason why it was necessary for two of your superior officers to give you such a simple order? A. No, sir.

Q. Did they give you the orders—withdraw that. Who first gave you the order to search the couch?

A. They both, simultaneous.

Q. A duet? A. Yes.

Q. And both pointed at you both said, “Search the couch”?

A. Well, they didn’t both point at me directly. They pointed to the rest of the officers and then they came to me. Sergeant Sasaki pointed at me first and then Captain Whitford might have pointed to somebody else. But they all came back to me.

Q. Well, I thought you said Sasaki and Whitford—“simultaneous” I believe was the word you used—gave you the orders to search the couch.

A. Yes, we were with that group.

Q. Do you want to change that testimony now?

A. No, sir.

The Court: Excuse me. You drop your voice at the end of what you are saying and you don’t enunciate. Will you [128] keep your voice up and pronounce all of your words clearly so that we can hear each word, and talk a bit louder?

The Witness: Yes.

Mr. Soares: That was all of the cross-examination.

(Testimony of Harry L. Pestano.)

The Court: All right. Redirect?

Mr. Hoddick: May I have about a half minute of the Court's time, please?

The Court: Yes.

Redirect Examination

By Mr. Hoddick:

Q. Mr. Pestano, when you were searching the couch—withdraw that. While you were searching the couch, actively engaged in searching the couch, were you fully aware of everybody who was in the room? A. No, sir.

Q. Were you aware of what each person in the room had in his or her hands? A. No, sir.

Q. Do you know whether Sergeant Sasaki was in the room all the time while you were searching the couch?

A. No, I only saw him at the time I came in and after a while he told us to search the couch, after.

Q. But while you were searching the couch, are you certain whether Sergeant Sasaki was there all the time or not? A. No, sir. [130]

Q. Are you certain whether he was in the room at all while you were searching the couch?

A. Yes. At the beginning he was.

Q. Did you have any conversations with Sergeant Sasaki while you were searching the couch?

A. No, sir.

Q. Did you stand and look at Sergeant Sasaki while you were searching the couch?

A. No, sir.

(Testimony of Harry L. Pestano.)

Q. Do you know what Sergeant Sasaki had in his hands while you were searching——

Mr. Soares: We now object to this question as leading and suggestive. The rule as to leading questions still applies.

The Court: The question is not leading. Overruled.

Mr. Soares: Save an exception.

Q. (By Mr. Hoddick): The question, Mr. Pestano, is, do you know what Sergeant Sasaki had in his hands while you were searching the couch?

A. While I was searching the couch my back was turned to the rest of the crowd as the couch is up against the wall. I didn't look around. My attention was fully focused on the couch.

Q. Well, how do you know what he had in his hands [130a] while you were searching the couch?

A. After awhile, yes, I saw him with the bottle.

Q. After awhile? A. Yes.

Q. How much?

A. After I found my marihuanas. I mean after I found the——

The Court: Stricken. Disregard it, members of the Jury. Don't make that mistake again. After you found your cigarettes——

A. (Continuing): After I found my cigarettes and called Agent Wells and he in turn brought the Defendant, I saw Sergeant Sasaki with the bottle in his hand.

Q. He then had the bottle in his hand?

A. Yes, sir.

(Testimony of Harry L. Pestano.)

Mr. Hoddick: No further questions.

Recross-Examination

By Mr. Soares:

Q. How long did it take you to discover those cigarettes from the time you told, from the time you were told to search the couch until you found them, about how long?

A. I'd say a matter of minutes.

Q. What's that? A matter of seconds did you say?

A. Oh, about a little over a minute.

Q. In other words, from the time you were told to search the couch by Sasaki until the time you found the [131] cigarettes and called for Agent Wells, about a minute, a little over a minute had elapsed?

A. About a minute or a little over.

Q. During the time you were in that room there was a period when Sasaki had nothing in his hands and then after the search by you of the couch you found, you saw that he did have this bottle?

A. Yes.

Q. Exhibit 1 in his hand? A. Yes, sir.

Q. Did you see where he got the bottle from?

A. No, sir.

Q. And the first time you saw it was when he had it in his hand after you had found the cigarettes?

A. Yes, sir.

Mr. Soares: No further questions.

Q. (By Mr. Hoddick): Mr. Pestano, what was Sergeant Sasaki's position at the time he asked you to search the couch?

A. Sergeant.

(Testimony of Harry L. Pestano.)

Q. No. How was he? Was he standing or sitting down? A. He was standing.

Q. At that time did you look at Sergeant Sasaki's hands?

A. No, sir, I just could see half of his body, that's [132] all.

Mr. Hoddick: No further questions.

Q. (By Mr. Soares): You have no doubt that the man you have been referring to as Sergeant Sasaki is the man who testified as the first witness in this case, have you?

A. Sergeant Richard Sasaki, yes.

Q. No doubt that that was the same man?

A. Yes, sir.

Mr. Soares: That's all.

Mr. Hoddick: No further questions.

The Court: You are excused. Next witness.

(Witness excused.)

Mr. Hoddick: Officer Shaffer, please.

PAUL SHAFFER

a witness on behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

The Court: Will you please state your name?

The Witness: Paul Shaffer.

The Court: Age?

The Witness: 33.

(Testimony of Paul Shaffer.)

The Court: Residence?

The Witness: House 137 New Mill Camp, Aiea.

The Court: Occupation? [133]

The Witness: Police Officer.

The Court: Employed by?

The Witness: The Honolulu Police Department.

The Court: You are a citizen of the United States?

The Witness: Yes, sir.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.

By Mr. Hoddick:

Q. How long have you been with the Honolulu Police Department, Mr. Shaffer?

A. Since 1941.

Q. And in July of 1949 with what branch of the service were you, with what branch of the service did you work?

A. I was working with the vice division.

Q. Were you assigned to the vice division?

A. Yes, sir, I was.

Q. And at that time how long had you been with the vice division?

A. Approximately about a month.

Q. Now, do you know the Defendant in this case, Winston Churchill Henry?

A. Yes, I do.

Q. Will you point him out, please?

A. Right over there. [134]

(Testimony of Paul Shaffer.)

Q. The man on the far end of the table?

A. Yes, sir.

Mr. Hoddick: May the record show that the witness has identified the Defendant?

The Court: Which table?

The Witness: The man sitting next to Mr. Soares in the brown suit.

Mr. Soares: Which side?

The Court: Which side?

The Witness: On Mr. Soares' left.

The Court: All right.

Q. (By Mr. Hoddick): Mr. Shaffer, did you participate in a search of the premises of 803 Hausten Street on July 16, 1949?

A. Yes, I did.

Q. And did you have occasion after that search to speak with the Defendant concerning anything you found? A. Yes, I did.

Q. And what did the Defendant say?

A. I interviewed the Defendant in the offices, the vice offices of the police station in regard to a gun that I found at the scene.

Q. At about what time was that, Mr. Shaffer?

A. At approximately 1 o'clock, 1:05. When I found the gun—— [135]

Mr. Soares: Just a minute. The question has been answered. If Counsel has another question, we want an opportunity to object.

The Court: Just answer the question, and I want to know whether it is a.m. or p.m. You said something about 1 o'clock.

(Testimony of Paul Shaffer.)

The Witness: I don't understand that, whether the time I found the gun or when I talked to him.

The Court: When you talked to him.

The Witness: Oh, it was in the afternoon, approximately about 5:00 p.m.

Q. That's when you interrogated the Defendant at the station? A. Yes, sir.

Q. Now, for purposes of the record what time did you find the gun?

Mr. Soares: We object to any reference or testimony with reference to a gun, if the Court please, as incompetent, irrelevant and immaterial.

Mr. Hoddick: I will withdraw it.

Mr. Soares: As not pertaining to any issue in this case.

Q. (By Mr. Hoddick): During the conversation with the Defendant, what did he say?

Mr. Soares: We object to that, if the Court please, [136] first on the ground that the corpus delicti has not been shown, and anything the Defendant said in the nature of an admission or confession would not be admissible, and anything that was not in the nature of an admission or confession would be incompetent, irrelevant and immaterial.

Mr. Hoddick: I submit that the corpus delicti has not been proved, your Honor, and in the interests of presenting an orderly picture to the Jury and to the Court we felt that it was best that Mr. Shaffer testify at this time concerning that conversation. It is in the nature of an admission as

(Testimony of Paul Shaffer.)

to a material element concerning this case. And I think it is properly admissible at this time. We will prove the corpus delicti before the day is through.

The Court: You had better prove it first. I am disposed to sustain the objection at this time until you have established at least that a crime has been committed.

Mr. Hoddick: May I have the privilege of recalling Mr. Shaffer from the stand?

The Court: Yes.

Mr. Hoddick: Will you step out again, please?

(Witness excused.)

Mr. Hoddick: Mr. Wells, will you take the witness stand?

WILLIAM K. WELLS

a witness on behalf of the Plaintiff, being duly sworn, testified as follows: [137]

Direct Examination

The Court: What is your name?

The Witness: William K. Wells.

The Court: Age?

The Witness: Fifty-seven.

The Court: Residence?

The Witness: 856-20th Avenue, Honolulu, T. H.

The Court: Occupation?

The Witness: Acting District Supervisor,
Bureau of Narcotics, U. S. Treasury Department.

(Testimony of William K. Wells.)

The Court: You are a citizen of the United States?

The Witness: Yes, sir.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.

By Mr. Hoddick:

Q. How long have you been with the Bureau of Narcotics, Mr. Wells?

A. Since November 21, 1921.

Q. And have you always been in service with them in Hawaii?

A. In Hawaii and in the mainland.

Q. Where did you serve on the mainland?

A. Beg pardon?

Q. Where did you serve on the mainland? [138]

A. In Michigan, Ohio, North, South Dakota, Wisconsin, Nebraska and the State of Minnesota.

Q. Do you know the Defendant in this case?

A. I do.

Q. Will you point him out, please?

A. The gentleman sitting on the left of Mr. Soares.

Mr. Hoddick: May the record show that the witness has identified the Defendant?

The Court: Yes.

Q. Did you have occasion to search the premises at 803 Hausten Street? A. Yes, sir.

Q. On what date? A. On July 16, 1949.

Q. And did you have any kind of a search warrant for that purpose?

(Testimony of William K. Wells.)

A. I had a search warrant.

Q. And did you request anyone's assistance in the making of that search?

A. I went to the vice squad first on the night of July 12, 1949, to ask Captain Whitford to assist me to search the rear house located at 803 Hausten Street.

Q. Approximately what time did you arrive in the vicinity, immediate vicinity of 803 Hausten Street?

A. On July 16, about 8:30 a.m. [139]

Q. And what did you do when you got there?

A. With Officer Whitford, Captain Whitford, Sergeant Alfred Sasaki—I mean Alfred Sousa, Richard Sasaki and Theodore Kinney we concealed ourselves at 807-B Hausten Street with the permission of the owner.

Q. And how long did you stay there?

A. Stayed there until 12:30, 12:38 p.m., when I saw the Defendant walking towards Hausten Street.

Q. Then what did you do?

A. I spoke to Captain Whitford and Richard Sasaki and left the duplex apartment and proceeded towards a parked Packard car, license U-6696. The Defendant was outside of the car. I said, "Henry, I got a search warrant to search your premises."

Q. And then did he say anything?

A. He looked at me and said "O.K." Then we

(Testimony of William K. Wells.)

proceeded, that is, the Defendant, Captain Whitford, Sasaki, Sousa and Theodore Kinney, we proceeded towards the stucco house which is located in the rear of 803 Hausten Street. Before we got to the building the Defendant——

Mr. Hoddick: One second. May I have this marked for identification, your Honor, a photograph?

The Court: Yes.

The Clerk: U. S. Exhibit No. 10 for identification.

(The photograph referred to was marked "U. S. Exhibit [140] No. 10 for Identification.")

(Mr. Hoddick shows photograph to Messrs. Soares & Landau.)

Q. (By Mr. Hoddick): What happened after you got into the house or——

A. Prior to going into the house the Defendant called to someone to unlatch the lock to the screen door. A little girl let us in and I got into the living room with the Defendant. I served the search warrant on the Defendant and asked him if he wanted me to read the search warrant to him. He said, "No, Billy." After he accepted the search warrant I turned around to the boys and I said, "All right, let's start searching." In the meantime Officer Sasaki had gone upstairs and brought down Mrs. Helen Thomas, Charles Montgomery and Dolores Allen. That's Mrs. Thomas' sister. I went upstairs

(Testimony of William K. Wells.)

with the Defendant accompanied by Sergeant Sousa. We proceeded to search the bedrooms upstairs, and while we were searching the mauka bedroom, that is, the bedroom occupied by the Defendant——

Mr. Soares: We object to that, if the Court please. This is a conclusion of the witness.

The Court: He can testify as to how he knows.

Mr. Soares: Well, of course that is a vice of narrative testimony. A lot of stuff has gone in and has to be taken out later. The witness has gone far beyond answering the question. [141]

Mr. Hoddick: I think I asked him what happened after he got in the house.

Mr. Soares: He asked him what he found.

Mr. Hoddick: I didn't ask him what he found.

Mr. Soares: I don't want to bandy words with you. I will submit the matter to the Court.

The Court: You may proceed by question.

Q. (By Mr. Hoddick): You stated that you went upstairs for the purpose of making a search?

A. Yes, sir.

Q. And what room did you search upstairs?

A. Beg pardon?

Q. What room did you search upstairs?

A. I searched the two bedrooms upstairs. While I was searching the mauka bedroom——

Q. What happened?

A. ——Officer Sasaki yelled for me to come downstairs. I took the Defendant with me to the

(Testimony of William K. Wells.)

rear of the building and Officer Sasaki said in the presence of the Defendant, "I found something." I looked in this hole. I saw an Ovaltine bottle.

Q. And did you tell Sergeant Sasaki what to do with it?

A. I told Sergeant Sasaki to hold the bottle at the [142] top of it and for him to come upstairs with us. He came upstairs.

Q. Why did you tell him to come upstairs?

Mr. Soares: We object to the conclusions or undisclosed reasons of the witness, if the Court please. Let him tell the facts in the proper way, and the proper function will determine why he did it——

Mr. Hoddick: Your Honor, I make no point of this. But his reason for asking Sergeant Sasaki to come upstairs may assist the jury in interpreting these facts, in understanding the testimony of the witnesses.

Mr. Soares: What opportunity have we to produce evidence to contradict his testimony as to his undisclosed reasons?

The Court: He is being asked to disclose it.

Mr. Soares: That's the point. They were undisclosed to anybody at the time. If he had made a statement at the time, that is one thing. But for him to keep locked in his breast certain reasons that he had and not make them known and then come to the Court and testify to them we submit is not proper evidence.

The Court: Overruled.

(Testimony of William K. Wells.)

Mr. Soares: Save an exception.

Mr. Hoddick: Will you answer the question, please, Mr. Wells?

A. I told Sergeant Sasaki at the time downstairs to be [143] sure—I mean to hold the bottle at the top so we can have Lieutenant Fraga to take some prints. We proceeded upstairs.

Q. Now, what happened after you got upstairs?

A. And then, while searching the makai bedroom Officer Case yelled upstairs for me to come downstairs.

Q. Approximately how long was that after you had gotten upstairs?

A. A good 15, 20 minutes, I think.

Q. You went downstairs in response to the call of Officer Case?

A. Went downstairs. In the sun porch, in the back of the patio I mean, there was a couch there. Lying on the couch was a bottle containing some white substance.

Q. And then what did you do?

A. I gave Officer Case the same instructions.

Q. That you had given Officer Sasaki?

A. Yes, sir.

Q. And then?

A. And then we proceeded back upstairs.

Q. For what purpose?

A. To continue the search.

Q. Did you? A. Yes, sir.

Q. And what happened next?

(Testimony of William K. Wells.)

A. While searching, when we about finished the search [144] of the bedroom, I was called downstairs again, and Officer Ferry showed me where he had found a box in a brown paper bag in the back of the eaves in the rear of the house. I counted the contents in the box and it contained 29 cigarettes.

Q. And what did the contents of the paper bag look like?

A. Well, it looked like, I would say, Garfield laxative tea.

Q. And then what happened after you had counted the cigarettes and inspected the contents of the paper bag?

A. I instructed Officer Ferry to hold on to it. We proceeded upstairs and when we got through searching upstairs we came downstairs, proceeded to search the kitchen.

Q. Did anything happen while you were searching?

A. Yes, searched the kitchen.

Q. Did anything unusual occur while you were searching the kitchen?

A. Well, while I was searching the kitchen I was called in the living room by Officer Pestano and he showed me where he had found six cigarettes on a couch.

Q. And then?

A. Then I went back to the kitchen, proceeded to search the kitchen, and then I asked the Defendant if he had the key to the door of a closet which led underneath the stairway.

(Testimony of William K. Wells.)

Q. And what did the Defendant say? [145]

A. Well, he said you can't—he didn't have it. So I told him that I have to search that closet, I had a search warrant. He then told Mrs. Thomas to go upstairs and get the key, which she did, and came back and handed it to me, and I opened the door, went in and proceeded to search the closet.

Q. Did you find anything in the closet?

A. I found a loose panel in the closet.

Q. Did you speak to the Defendant about this loose panel?

A. Yes, sir, I said to the Defendant, "Shorty, this is a good plant, but it's empty." He said it was there before he moved in.

Q. Then did that mark the completion of your search of the premises? A. Yes, sir.

Q. What did you do then?

A. Then I came to the kitchen to wash my hands. I had a conversation with the Defendant. I said to the Defendant, "Shorty, you have a nice place here. How long have you been living here?" He said, "Oh, not very long." Then I went to the dining room; in the presence of the Defendant I counted the contents in the Ovaltine bottle and it contained 915 capsules.

Q. Did you take possession of the Ovaltine bottle at [146] that time?

A. After Lieutenant Fraga had dusted all the evidence and tried to lift some prints.

Q. And from whom did you receive the Ovaltine bottle?

(Testimony of William K. Wells.)

A. From Officer Sasaki. He was right there. We then initialed——

Q. Just one second. Did you put any identifying marks on it? That was going to be my question.

A. Yes, sir. Then I then initialed the bottle after Sergeant Sasaki.

Q. And when you counted the contents, what was the count? A. 915 capsules.

Q. Did you ever release possession of that bottle to anybody else?

A. No, sir. Well, I did, yes, sir. On July 18, 1949.

Q. And to whom did you give it?

A. I gave that bottle to Mr. G. J. Carr, U. S. Customs Chemist, for analysis.

Q. Did you ever receive an Ovaltine bottle back from Mr. Carr? A. I did, on July 22, 1949.

Q. And was that the same bottle?

A. Yes, sir.

Q. How could you tell? [147]

A. It had my initials on it, W.K.W.

Q. Had you put your initials on any other Ovaltine bottles? A. Not that day.

Q. Showing you U. S. Exhibit No. 1 for identification purposes, can you identify it, Mr. Wells?

A. Yes, sir. That's my initials, W.K.W., 7/16/49.

Q. And what is Exhibit No. 1? Where did you get it?

(Testimony of William K. Wells.)

A. It contained 915 capsules that I received from Sergeant Sasaki at, in the rear house at 803 Hausten Street on July 16, 1949.

Q. Is that the bottle which you gave to Mr. Carr, the Customs chemist, on July—what was the date? A. 18, 1949. Yes, sir.

Q. Was there any change in the condition of that bottle or in its condition, in the condition of its contents, from the time that you received it from Sergeant Sasaki until the time that you gave it to Mr. Carr? A. No, sir.

Q. After receiving that bottle back from Mr. Carr on July 22 until you brought it into court, was there any change in its condition or in the condition of its contents? A. No, sir.

Q. Did you receive anything from Officer Case?

A. I received a bottle from Officer Case. I took the [148] cork out.

Q. Where did you receive it?

A. In the kitchen, in the house in the rear of 803 Hausten Street. And I put a little of the contents on my tongue, rubbed it on my tongue. The Defendant said, "Man, don't do that, Billy; that's dynamite."

Q. What did you do with that bottle after that?

A. And I said, "This bottle must contain about 200 grains." The Defendant said, "No, more than that."

Q. And then what did you do with the bottle?

A. I returned it back to Officer Case and told

(Testimony of William K. Wells.)

him to hold on to the bottle until we got back to the vice squad office where we put a wrapper around it and initialed it down there, and I took possession of same.

Q. You put your initials on the bottle?

A. Yes, sir.

Q. Showing you, Mr. Wells, U. S. Exhibit No. 5 for identification purposes, I will ask you to identify it? A. That's my initials, W.K.W.

Q. Is that the bottle which you received from Officer Case? A. Yes, sir.

Q. From the time which you finally received it from Officer Case at the police station—withdraw that question. Did you ever give that bottle to anybody else? [149]

A. On July 18, 1949, I gave this bottle to Mr. G. J. Carr, the chemist, for analysis.

Q. From the time that you received that bottle from Officer Case at the police station until the time you gave it to Mr. Carr, was there any change in the condition of the contents of that bottle?

A. Yes, sir. You mean when I received——

Q. From the time you received it from Officer Case at the police station until the time you gave it to Mr. Carr, was there any change in the condition of the contents of the bottle?

A. Just the stickers on it.

Q. The contents of the bottle? A. No, sir.

Q. Was that bottle returned to you by G. J. Carr?

(Testimony of William K. Wells.)

A. It was returned to me on July 22, 1949.

Q. And have you had it in your possession since that date? A. Yes, sir.

Q. Until when?

A. Until the, until when the trial started the other day.

Q. And to whom did you give the bottle at that time? A. To you.

Q. Now, from the time that you received that bottle [150] from Mr. Carr until the time that it was marked for identification purposes here in court, was there any change in the condition of the contents of that bottle? A. No, sir.

Q. Did you receive anything from Officer Ferry?

A. Yes, sir, I received a box containing 29 cigarettes and a brown paper bag containing a substance that looks like Garfield laxative tea.

Q. And where did you receive those two items?

A. In the dining room at the rear house at 803 Hausten Street.

Q. And what did you do with those two articles? Withdraw that. Did you put any identifying marks on those two articles?

A. I placed my initials on it.

Q. Showing you U. S. Exhibit No. 6 for identification purposes and 7 for identification purposes, I ask you if you can identify it.

A. This is the box that I received from Officer Ferry. That's my initials, W.K.W., dated 7/6/49.

Q. Did you examine the contents at the time

(Testimony of William K. Wells.)

you received it from Officer Ferry or before?

A. I just counted the cigarettes.

Q. Will you look in that box at this time and tell me if the contents are similar or the same?

A. About the same.

Q. Now, looking at U. S. Exhibit No. 7 for identification purposes, do the contents look like Garfield laxative tea?

A. It does.

Q. Did you ever give either of those two articles to anybody else?

A. I gave the two articles to Mr. Carr, the chemist, on July 18, 1949, for analysis.

Q. Did you receive those two articles back from Mr. Carr at any time?

A. I received it back on July 22, 1949.

Q. From the time these two exhibits were delivered to you by Mr. Ferry until the time you gave them to Mr. Carr, was there any change in the condition of their contents?

A. No, sir.

Q. From the time you received them from Mr. Carr on July 22 until the time you brought them into court, was there any change in the condition of their contents?

A. No, sir.

Q. Did you receive anything from Officer Harry Pestano?

A. I received——

Q. After this search.

A. No, sir. I received the six cigaretteers from him at the vice office and I kept it in my possession.

(Testimony of William K. Wells.)

Q. Did you ever give them to anybody else?

A. Until July 18, 1949, when I gave the six cigarettes to Mr. G. J. Carr, chemist, for analysis.

Q. Did you put any identifying marks on those cigarettes? A. I did.

Q. Showing you U. S. Exhibit for identification purposes No. 9 and 10, I will ask you to identify them.

The Clerk: That's 8 and 9.

Q. Excuse me. Exhibits 8 and 9.

The Court: For identification.

A. These are the six cigarettes that I obtained from Officer Harry Pestano at the vice squad office on July 16, 1949.

Q. Now, from the time that you received those six cigarettes from Harry Pestano until the time that you gave them to Mr. Carr on July 18, was there any change in those cigarettes?

A. No, sir.

Q. That is, except for initials that were put on them? A. Yes, sir, that's all.

Q. And from the time you received them from Mr. Carr until the time you brought them into court, was there any change in their condition?

A. No, sir.

Q. Where do you keep these? Where did you keep these [153] various exhibits which I have asked you to examine when you had them in your possession?

(Testimony of William K. Wells.)

A. Well, it's what we call a strong room in my office, room 575, Alexander Young Building, Honolulu, T. H.

Q. Who has access to that strong room?

A. Only me.

Q. Only you? A. Yes, sir.

Q. Was there a Mrs. Thomas at 803 Hausten Street at the time you made the search?

A. Yes, sir.

Q. Before you left the premises at 803 Hausten Street, did the Defendant say anything to you concerning Mrs. Thomas?

A. I went into the living room where she was sitting down. In the presence of the Defendant I asked Mrs. Thomas the age of the two young girls. The Defendant spoke up and said, "Don't ask any questions." I then told her that I just asked that question because I think the two young children should be taken to some of her friends' place.

Q. Did you take Mrs. Thomas down to the police station with you? A. Yes, sir.

Q. Did the Defendant say anything concerning that?

A. Oh, while in the kitchen he told me in the kitchen, he said, "Billy, you don't have to take her down; she doesn't [154] know anything about this stuff." I said, "Well, then, is it your stuff?" He just smiled and didn't reply.

Mr. Hoddick: No further questions.

The Court: Just a minute. We will take our usual recess in a moment. Very well.

(Testimony of William K. Wells.)

(A recess was taken at 11:00 a.m.)

The Court: Note the presence of the Jury and the Defendant together with his attorneys. You may proceed on cross-examination.

Cross-Examination

By Mr. Soares:

Q. Mr. Wells, you are the one who arrested the Defendant? A. Yes, sir.

Q. And where was he when you arrested him?

A. After the——

Q. I simply asked you where?

A. When we got upstairs to the mauka bedroom, coming down——

Q. What time was that?

A. I would say it was between 1 o'clock and 1:20 p.m.

Q. And in relation to your serving him the search warrant, was it before or after the search warrant was served?

A. After the search warrant was served. [155]

Q. How long after?

A. I would say about half an hour or 40 minutes.

Q. At any rate, after you served the search warrant you never let him out of your sight, did you?

A. No, sir.

Q. Whenever you called from up and down the stairs you required him to accompany you?

(Testimony of William K. Wells.)

A. Yes, sir.

Mr. Soares: No further questions.

The Court: Redirect?

Redirect Examination

By Mr. Hoddick:

Q. Mr. Wells, when you were called downstairs by Sergeant Sasaki, for instance, what did you say to the Defendant?

Mr. Soares: We object to that, if the Court please, as not proper redirect. We didn't go into any conversations or any occurrences. The cross-examination was limited to the service of the search warrant, the placing of the Defendant under arrest, and that fact that he never left him out of his sight. No conversation.

Mr. Hoddick: There was a question asked of this witness as to whether he required the Defendant to go downstairs. I want to know what the nature of this requirement was, if it was a requirement or it was merely a request. [156]

Mr. Soares: I didn't understand that to be the question.

The Court: I didn't either. You had better clarify your question.

Q. (By Mr. Hoddick): May I ask when Sergeant Sasaki called you to come downstairs, what did you say to the Defendant?

A. I said, "Shorty, come on downstairs with

(Testimony of William K. Wells.)

me." He accompanied me downstairs to the back of the building.

Q. And if he had refused to go downstairs with you, what would you have done?

Mr. Soares: We object to the speculation.

The Court: Sustained.

Mr. Hoddick: Your Honor, if I might interpose a short argument before the ruling is made—would you mind withdrawing the ruling for a minute?

The Court: I can't see possibly what he might have done, if it has any bearing on what he did do—what he did do, not what he might have done—

Mr. Hoddick: Your Honor, I think the question of whether the Defendant—if I can foresee where Mr. Soares is headed—the question of whether the Defendant was under arrest prior to the time that these various substances were found—

The Court: Well, if you want to be heard, I will temporarily withdraw the ruling to allow you to be heard. But my ruling was made based on the fact that we are interested in [157] what he, the witness, did do, not what he might have done. If you want to be heard until I find out what you are driving at I will excuse the Jury and hear you. Gentlemen of the Jury, will you step outside a moment?

(Jury leaves courtroom at 11:15 a.m.)

Mr. Hoddick: May it please the Court, I am not concerned with Mr. Soares questions or—

The Court: Just a minute. The Jury is now

(Testimony of William K. Wells.)

absent. The question before the Court is, what would you have done if he refused?

Mr. Hoddick: As I say, I am not concerned in this redirect examination with Mr. Soares' questions or Mr. Wells' answers. But it seems to me that the record should be made clear here, if it was the case—I don't know whether it was the case or not—as to whether the Defendant was arrested or was under arrest, actual or not, prior to the time that the first suspected substances were found.

The Court: Well, as it stands now, the evidence is simply that the search warrant was served on the Defendant in his living room at 803 Hausten Street; about 30 to 40 minutes thereafter he was placed under arrest by the witness. And from that there is no inference that he was previously under arrest.

Mr. Hoddick: Unless such an inference were to be drawn from the witness' statement that he required the Defendant [158] to go downstairs with him.

Mr. Soares: That has been cleared up. That's why we didn't object when Counsel asked the other question. What did you say, and then whether that was a command or a request is a matter of argument. But definitely what he might have done under different circumstances couldn't possibly be any evidence of any issue and certainly couldn't be redirect examination. Counsel has cleared that up now by saying that he is not concerned with any of the questions we asked on cross.

(Testimony of William K. Wells.)

Mr. Hoddick: It shows what the officer's state of mind was at the time that he asked Mr. Henry to go downstairs with him.

The Court: Mr. Reporter, will you go back to Mr. Soares' last question on cross-examination?

(The reporter read the question referred to.)

The Court: Well, the word "required" is the significant word there, in view of what you are driving at. You may certainly, in view of the direct examination, ask what he meant by "required." But as to asking him what he, the witness, would have done if the Defendant had refused to accompany him, I still don't see it.

Mr. Hoddick: Perhaps, your Honor, that was an awkward way of trying to resolve the meaning of the word "required" as used by the witness. I will withdraw that question and try [159] to frame another.

Mr. Soares: May I suggest to the Court that he has already cleared that up for almost the second or third time, the second or third question that Mr. Hoddick asked, and the question just before the one that we objected to cleared it up by his having said that he merely asked him to come down.

Mr. Hoddick: Is that your recollection of his answer?

Mr. Soares: Yes.

Mr. Hoddick: All right.

The Court: Well, all of that indicates that there is nothing significant to the word "required."

(Testimony of William K. Wells.)

Mr. Soares: No. We don't make any point of it.

Mr. Hoddick: Well, I didn't know what the defense was leading at, but I wanted to be sure that the record is straight on this point in the trial.

Mr. Soares: We may argue on the fact that the use of the word "required" doesn't denote, doesn't have any force at all.

The Court: It could. Well, anyway, you withdraw the question?

Mr. Hoddick: I withdraw the question, and no further questions.

The Court: And what?

Mr. Hoddick: No further questions.

The Court: We will call the Jury back. [160]

(Jury returns to courtroom at 11:20 a.m.)

The Court: Note the presence of the Jury——

Mr. Hoddick: No further questions.

The Court: ——and the Defendant together with his attorneys.

Mr. Hoddick: No further questions of this witness.

The Court: All right. The witness is excused.

(Witness excused.)

Mr. Hoddick: Call Gilbert J. Carr, please.

GILBERT J. CARR

a witness on behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

The Court: What is your name?

The Witness: Gilbert J. Carr.

The Court: Age?

The Witness: 43.

The Court: Residence?

The Witness: 115 Kapaha, Kahala.

The Court: On this island?

The Witness: That's right.

The Court: And you are employed by——

The Witness: U. S. Customs chemist.

The Court: And you are a citizen of the United States?

The Witness: That's right. [161]

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.

By Mr. Hoddick:

Q. Mr. Carr, where did you go to school?

A. University of Chicago.

Q. And what did you study there?

A. Chemistry, B. S. degree, majoring in chemistry.

Q. Did you specialize in any particular field of chemistry?

A. No, just majored in chemistry.

(Testimony of Gilbert J. Carr.)

Q. And what did you do after you finished with the University of Chicago?

A. Well, I have been employed in the laboratory of the Treasury Department since 1927. I was going to school off and on during that time.

Q. And while you were employed with the Treasury Department and in their laboratory, what type of work did you do?

A. Analyzed all types of narcotics, liquors, toilet preparations.

Q. Are there standard pharmaceutical tests for narcotics? A. Yes, there are.

Q. Are you familiar with those tests? [162]

A. Yes, I am.

Q. Are there particular tests for the determination or finding of cocaine? A. Yes, there is.

Q. Are you familiar with those tests?

A. Yes, I am.

Q. Are there particular tests for the finding and analysis of heroin? A. Yes, there is.

Q. Are you familiar with those tests?

A. Yes.

Q. And are there particular tests for the analysis and determination of marihuana?

A. Yes.

Q. Are you familiar with those tests?

A. Yes, I am.

Q. Have you used those tests?

A. I have, on many occasions.

Q. Over a course of how many years?

(Testimony of Gilbert J. Carr.)

A. Oh, about 15 years.

Q. How long have you been with the Customs laboratory in Hawaii, Mr. Carr?

A. I have been since January of this year, last year, January, 1949.

Q. Has Mr. Wells ever submitted substances to you for [163] analysis? A. Yes, he has.

Q. Did he do that on, did he submit substances to you for analysis on July 18th of this year?

A. My record will show. On July 18th Mr. Wells submitted one large envelope.

Q. And did you analyze those substances?

A. Yes, I did.

Q. Did you make a report of that analysis?

A. Yes, my report here shows.

Q. Don't read your report. Did you make a record? A. Yes, I did.

Q. A report? A. Yes, I did.

Q. And is that the type of report which is made whenever you analyze any substance?

A. That is routine in the laboratory.

Mr. Hoddick: Might I call Counsel to the bench for a minute?

The Court: Yes.

(Court and Counsel confer.)

Q. (By Mr. Hoddick): Now, I believe you testified, Mr. Carr, that on July 18, 1949, Mr. Wells brought certain substances to you for analysis? A. That's right.

Q. Did you put any identifying marks on the containers in which those substances were?

(Testimony of Gilbert J. Carr.)

A. There's a lab number and my initials on each sample.

Q. Showing you U. S. Exhibit No. 1 for identification purposes, I ask you if this is one of the articles which Mr. Wells brought to you on July 18, 1949?

A. Yes, it is.

Q. And how do you know?

A. This is my initials and date right here.

Q. Does the laboratory number appear on the article itself?

A. No, that is probably on the other envelope. I have here—removed so many capsules from here. That should be in another envelope.

Q. That is in your handwriting?

A. Yes, that's right.

Q. Now, did you analyze the contents of this Exhibit No. 1 for identification purposes?

A. Yes, I did.

Q. How did you make your analysis?

A. I removed from that container 10 capsules taken at random, and of those 10 I analyzed a certain quantity.

Q. And what type of tests did you make on the 10?

A. Qualitative tests and quantitative tests. And it [165] showed the presence of—can I have the envelopes, please? I can identify them much better.

Q. I will get these in properly. What did you do with the 10 capsules or what was left of them

(Testimony of Gilbert J. Carr.)

after you had performed the tests which you took from U. S. Exhibit No. 1?

A. They were placed in a laboratory envelope and sealed.

A. And did you put your identifying marks on that? A. Yes, I did.

Q. I show you a Treasury Department envelope which on the lefthand corner has Exhibit 4 marked on it, and ask you if that is the envelope in which you sealed the residue? A. That's correct.

Q. Now, from your analysis of those capsules which you took from the Ovaltine bottle, what did you determine their contents to be?

A. These contained heroin-hydrochloride.

Q. And you say you made both a quantitative and qualitative test? A. That is correct.

Q. What did your quantitative test reveal?

A. 86.7 per cent anhydrous heroin; that is, without water.

Q. And what is contained in that envelope?

A. This is what was remaining after analysis.

Q. I show you U. S. Exhibit No. 3 for identification [166] purposes and ask you if this is one of the articles which was delivered to you by Mr. Wells on July 18, 1949? A. Yes, it is.

Q. And did you analyze the contents of that article?

A. Yes, I removed a certain quantity also from this container.

(Testimony of Gilbert J. Carr.)

The Court: Excuse me. What is the mark on that—three or five for identification?

Mr. Hoddick: I beg your pardon. That is U. S. Exhibit No. 5 for identification purposes.

Q. You removed a certain quantity for analysis?
A. Yes, I did.

Q. And what was the result of your analysis?

A. That analysis showed this contained, this container contains—this contained cocaine hydrochloride.

Q. Did you make both a quantitative and qualitative analyses?

A. Yes, I did. This contained 86.1 per cent of anhydrous cocaine.

Q. And what did you do with the part that you had removed for purposes of testing?

A. That was placed in an envelope and sealed and returned to Mr. Wells.

Q. And is this the envelope in which you placed the residue? [167]
A. Yes, it is.

Q. I show you U. S. Exhibit No. 7 for identification purposes and ask you if this is one of the articles which Mr. Wells gave you for analysis on July 18, 1949?

A. No record on here. But my record here shows "Taken from a paper bag, 29.6 grains."

Q. What did your analysis of the 29.6 grains which you took from the paper bag reveal?

A. Marihuana.

Mr. Landau: I object to this, if the Court

(Testimony of Gilbert J. Carr.)

pleases, unless we have some definite link-up at the moment. That paper bag——

Mr. Hoddick: Your Honor, I suggest that Mr. Wells has testified that he gave that paper bag to Mr. Carr on July 18th.

The Court: That is right.

Mr. Hoddick: And his record shows that he received a paper bag from which he took 86.6 and Mr. Wells also testified that he received the paper bag from Mr. Carr on July 22nd, and that is the same paper bag.

Mr. Landau: That may be so, but that is not necessarily the bag that Mr. Carr himself tested.

The Court: There is a gap there. The testimony is, as you said, that Mr. Wells testified having given this man a paper bag on a certain date for purposes of chemical analysis, [168] but whether this is that bag and the contents that he tested, we don't know.

Mr. Hoddick: Could I have a short recess, your Honor, maybe a couple of minutes of the Court's time?

The Court: Look at that paper bag again. Aren't your initials on it?

The Witness: I usually do that by habit. I can't see them.

The Court: Look in the folds, on the bottom of it.

The Witness: No.

Q. (By Mr. Hoddick): Mr. Carr, on the day

(Testimony of Gilbert J. Carr.)

that you received these articles that you have testified to from Mr. Wells, did you receive more than one paper bag?

A. The records only show one paper bag.

Q. From your recollection did you receive more than one paper bag?

A. I wouldn't remember.

Q. Those records are made at the time——

A. At the time the samples are received.

Q. If that record shows that you made an analysis of the contents of a paper bag received at that time, it necessarily is the paper bag which you received from Mr. Wells?

A. That's correct.

Mr. Landau: I object to that, if the Court please. [169] That is speculative.

The Court: How do you know somebody else didn't give him a paper bag that day having something in it for testing? Mr. Witness, do you know whether that is the paper bag that you received from Mr. Wells and from which you took something and tested it? Do you know that positively?

The Witness: Yes, I do.

Q. (By Mr. Hoddick): How do you know that?

A. I remember Mr. Wells bringing in this particular package.

Q. You remember what?

A. I remember Mr. Wells bringing in this particular package. This is one of those instances when I do remember.

(Testimony of Gilbert J. Carr.)

Q. And you took from that package a certain quantity? A. A certain quantity.

Q. For analysis? A. That's correct.

Q. And what did that analysis of the quantity which you took from the paper bag reveal?

A. It contained marihuana.

Q. You have tested many times for marihuana before? A. Yes, I have.

Q. What did you do with the part which you removed from the paper bag for purposes of test?

A. I placed that in one of my envelopes and sealed it and returned it to Mr. Wells.

Q. Do you have that envelope there now which I just handed you? A. Yes, I have.

Q. I show you U. S. Exhibit No. 8 for identification purposes and ask you if that was one of the articles given to you by Mr. Wells on July 18, 1949, for purposes of analysis?

A. Well, this is my envelope containing three cigarettes which I took from a lot of six. He had six. I took three and placed it in this envelope after analysis.

Q. Do you remember what the six were contained in?

A. No, I just have here "taken from a lot of six."

Q. And are these three cigarettes that are in here, were they examined by you?

A. Yes, they were.

Q. And how can you tell that?

(Testimony of Gilbert J. Carr.)

A. This is—my initials appear on each cigarette.

Q. And what did you find those cigarettes contained?

A. Cigarettes contained marihuana.

Q. Will you open up U. S. Exhibit No. 9 for identification purposes, Mr. Carr, and tell me whether Mr. Wells gave you those cigarettes for analysis on July 18, 1949?

A. Yes, this is the other three. My initials also appear on these three. [171]

Q. And what did you find that these three cigarettes contained?

A. I didn't test those. They are the three remaining.

Q. The other three which were in the lot of six?

A. That's right.

Q. How did you select the three which you did test?

A. Just took three at random.

Q. Now, Mr. Carr, from the time that you received the six cigarettes which are contained in U. S. Exhibit No. 8 and 9, U. S. Exhibit No. 1 for identification purposes, and U. S. Exhibit No. 5 for identification purposes, and U. S. Exhibit No. 7 for identification purposes, until you returned those articles to Mr. Wells, was there any change in the condition of their contents other than the fact that you removed a certain portion from the Ovaltine bottle and the smaller bottle?

(Testimony of Gilbert J. Carr.)

A. No, there wasn't.

Mr. Hoddick: No further questions.

Mr. Landau: Would it be possible, if the Court pleases, to start my cross-examination of this witness at two?

Mr. Hoddick: I would like at this time, before you start your cross-examination—something I neglected to do——

Mr. Landau: If it takes no more time than 12.

Mr. Hoddick: ——to offer in evidence U. S. Exhibit No. [172] 9 for identification purposes and U. S. Exhibit 8 for identification purposes, U. S. Exhibit No. 7 for identification purposes, U. S. 5 for identification purposes and U. S. 1 for identification purposes.

Mr. Landau: I would like to object, if the Court pleases, to the offer until after the cross-examination, which is one of the reasons why—the things that I had in mind—I had asked the Court to be permitted to start my cross at two o'clock.

The Court: I haven't any objection to that. The thing that is confusing me is that I don't remember whether there is one thing marked for identification that hasn't——

Mr. Hoddick: Mr. Carr made no examination of it and it will not be offered in evidence. That is U. S. Exhibit No. 6.

The Court: Didn't Mr. Wells testify having given it to him for examination?

Mr. Hoddick: That is correct.

(Testimony of Gilbert J. Carr.)

Mr. Landau: That's right. I want to be able to check my notes on some of these matters, if the Court pleases.

The Court: I haven't any objection to your having until two o'clock. I am just trying to see whether my memory was serving me correctly or not. All right, if you are through with this witness——

Mr. Hoddick: I am, your Honor.

The Court: ——on direct examination, I will grant your [173] request that we adjourn now for the noon recess, and you may begin your cross-examination of this witness at two.

Mr. Landau: Very well.

(The Court recessed at 11:50 a.m.) [174]

Afternoon Session

The Court: Back to case No. 10,253. The Jury is present as is the Defendant together with his attorneys, and you may continue.

Mr. Hoddick: May it please the Court, just before the Court recessed I had felt I could finish my direct examination of Mr. Carr. I would like to have leave of Court to continue that direct examination for a few further questions.

Mr. Landau: No objection.

The Court: The nature of which is?

Mr. Hoddick: In order to establish——

The Court: Oh, you say no objection?

Mr. Landau: No objection.

(Testimony of Gilbert J. Carr.)

The Court: All right.

Direct Examination

(Continued)

By Mr. Hoddick:

Q. Mr. Carr, at the time that Mr. Wells brought to you these various articles on July 18, 1949, did he bring to you this box which is marked U. S. Exhibit No. 6 for identification purposes?

A. Yes, he did.

Q. And did you return that to Mr. Wells at a later date? A. Yes, with the other packages.

Q. And during the time that this U. S. Exhibit No. 6 [174a] for identification purposes was in your possession, was there any change in the condition of its contents? A. No, no change.

Q. How long does it take, Mr. Carr, to perform a test or to examine a substance to determine whether it is marihuana or not?

A. I can make one microscopic examination in just a few minutes.

Q. I should like to ask you to examine the contents or a sample of the contents of that box and give to the Court and to the Jury the results of that analysis.

(Witness opens a wooden box and produces a microscope.)

A. That contains marihuana. That one cigarette contains marihuana.

(Testimony of Gilbert J. Carr.)

Q. Did you just examine the contents of one cigarette?
A. Yes, just one.

Q. Will you examine one more?

A. I took out three. I think three should be—
(Examining cigarette through microscrope)—and that contains marihuana.

Q. That is another sample from one of the cigarettes contained in Exhibit 6?

A. That's right. And the third one contains marihuana.

Q. Mr. Carr, are you familiar with the narcotics tax paid stamps that are—— [175]

A. Yes, I am.

Q. Mr. Carr, did any of those articles which Mr. Wells brought in to you on July 18, 1949, bear such narcotics tax paid stamps?

A. No, it didn't. It had no stamps.

Mr. Hoddick: No further questions.

The Court: Cross-examination?

Mr. Landau: In view of the reopening of the direct examination, if the Court pleases, I don't think there is any reason for cross-examination. I just wanted to get that straightened out about these other items. That's all I had in mind under cross.

Mr. Hoddick: At this time, your Honor, I should like to renew my offer in evidence of U. S. Exhibit No. 1 for identification purposes, U. S. Exhibit No. 5 for identification purposes, No. 6, No. 7, No. 8 and 9, all for identification purposes.

(Testimony of Gilbert J. Carr.)

Mr. Landau: If the Court pleases, we object to the introduction of the items in evidence on the grounds that they have not been sufficiently identified and connected up with the Defendant. They don't tend to prove or disprove the matters herein.

The Court: Just a minute, Mr. Landau. Mr. Clerk, give the witness three separate envelopes to put the cigarettes which you have tested into them and seal them and initial [176] them. Unless you have your pen, you can use mine. (Witness puts cigarette contents in three separate envelopes, seals and initials them.)

Mr. Landau: I had completed my objection.

The Court: Do you want to be heard in argument?

Mr. Landau: We will submit it.

The Court: Overruled.

Mr. Landau: May we have an exception?

The Court: You may have an exception. The various matters offered in evidence now may be marked as evidence, and, Mr. Witness, give to the clerk the three envelopes that you have used to put the remnants of your test in which you have sealed and initialed. I think they had better accompany that box, either that or give it back to Mr. Wells.

Mr. Hoddick: We have no objections.

The Court: We are going to get lost in our records if they aren't in or out——

Mr. Hoddick: I would suggest that all envelopes be returned to Mr. Wells.

(Testimony of Gilbert J. Carr.)

The Court: Well, now, let's see. Those are the three the witness just used. There were some others that he had on the witness stand.

The Witness: No, I put those back in the box.

Mr. Hoddick: He has already returned those.

The Court: To Mr. Wells? [177]

Mr. Hoddick: That is right.

The Court: All right. Unless someone wishes to have them accompany the things that have been received in evidence, they may now, those three envelopes containing the remnants of the test made in Court, may now be returned to Mr. Wells. All right, Mr. Wells, you may take them.

Mr. Soares: That is in his official capacity?

The Court: Oh, yes, definitely. Now we will get to the marking of these things. Mr. Clerk, you call out the letters that you are giving.

The Clerk: No. 1 is U. S. Exhibit "D" in evidence.

The Court: "B"?

The Clerk: "D."

(U. S. Exhibit "D" was received in evidence.)

The Clerk: Number——

The Court: Wait a minute. U. S. Exhibit "D" was——

The Clerk: One for identification.

The Court: That was the large bottle?

The Clerk: The large bottle.

(Testimony of Gilbert J. Carr.)

The Court: All right.

The Clerk: No. 5 for identification is now being admitted as U. S. Exhibit "E," the small bottle.

(U. S. Exhibit "E" was received in evidence.)

Mr. Hoddick: That was "C"?

The Clerk: "E," "D" and "E." [178]

Mr. Hoddick: Thank you.

The Clerk: No. 7 for identification is U. S. Exhibit "F." That is the brown paper bag.

The Court: All right.

(U. S. Exhibit "F" was received in evidence.)

The Clerk: No. 8 for identification is U. S. Exhibit "G."

(U. S. Exhibit "G" was received in evidence.)

The Clerk: An envelope containing three cigarettes, No. 9 for identification is U. S. Exhibit "H."

(U. S. Exhibit "H" was received in evidence.)

The Clerk: Three cigarettes wrapped in cellophane paper

Mr. Hoddick: And, Mr. Thompson, U. S. Exhibit No. 6 is also offered in evidence.

The Clerk: As U. S. Exhibit "I."

(Testimony of Gilbert J. Carr.)

(U. S. Exhibit "I" was received in evidence.)

The Court: That is what?

The Clerk: No. 6 for identification.

The Court: All right. Next witness.

Mr. Hoddick: Mr. H. A. Patterson.

HOWARD A. PATTERSON

a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

The Court: Will you please state your name?

The Witness: Howard A. Patterson.

The Court: Age?

The Witness: 33.

The Court: Residence?

The Witness: 1565-C Pensacola.

The Court: Honolulu?

The Witness: Honolulu.

The Court: Occupation?

The Witness: Zone deputy collector of Internal Revenue.

The Court: You are a citizen of the United States?

The Witness: Yes, sir.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.

Q. (By Mr. Hoddick): Mr. Patterson, will

(Testimony of Howard A. Patterson.)

you keep your voice raised? A. Yes, sir.

Q. Where did you say you were employed?

A. As a zone deputy collector with the Internal Revenue service.

Q. How long have you been with the Bureau of Internal Revenue?

A. Since December 2, 1948, sir.

Q. And you are with the collector's office here in Hawaii? [180]

A. Yes, with the field division.

Q. And have been in that office since that date?

A. Yes, sir.

Q. Mr. Patterson, are you familiar with the marihuana order forms which are mentioned in Section 2593 Title 26 U. S. Code?

A. Yes, sir, I am.

Q. Did you at any time make demand on the Defendant for production of such order forms covering the marihuana which was picked up at 803 Hausten Street on July 16, 1949?

A. Yes, sir, I did.

Q. And where did you make such demand?

A. On the date of September 27th at 8:20 p.m.

Q. Where did you make such?

A. In the premises of Helen's Sweets Shop.

Q. And did he produce those order forms at that time? A. No, sir, he did not.

Q. Did you give him a time within which he should produce them?

A. I gave him until the close of business September 30th to produce it in the field office to me.

(Testimony of Howard A. Patterson.)

Q. And did he produce them?

A. No, sir, he did not.

Q. Now, are you familiar with the Defendant of whom I have been speaking? [181]

A. I have seen him.

Q. And will you point him out at this time?

A. Over there, sir.

The Court: Where?

Q. Will you designate where he is sitting?

A. On the end of the table.

The Court: Which end?

A. My right, sir.

Mr. Hoddick: May the record show that he has identified the Defendant, Mr. Winston Churchill Henry?

The Court: Yes. Excuse me. Let's go back. What was the date on which you made the demand on him?

The Witness: September 27th, sir.

The Court: 1949?

The Witness: Yes.

The Court: You gave him until the close of business of what?

The Witness: September 30th.

Mr. Hoddick: And this all took place in 1949?

The Witness: Yes.

Mr. Hoddick: No further questions.

The Court: Excuse me. Did he produce an order form?

The Witness: No, sir, he did not.

The Court: Cross-examination?

(Testimony of Howard A. Patterson.)

Mr. Landau: If the Court will give me just a moment, [182] please.

The Court: Yes.

Cross-Examination

By Mr. Landau:

Q. Do you know, Mr. Patterson, whether or not at the time you made the demand on September 27th that the Defendant had already been indicted for this offense? A. No, sir, I did not.

Q. Do you now know that at the time you made the demand he had already been indicted?

A. Yes, sir.

Q. Who was with you at the time that you made the demand, Mr. Patterson?

A. The demand was made in the presence of Mr. Wells.

Q. And at the request of Mr. Wells?

A. At the request of Mr. Wells.

Mr. Landau: That's all.

The Court: Redirect?

Mr. Hoddick: No further questions.

The Court: You are excused.

(Witness excused.)

Mr. Hoddick: Sergeant Theodore Kinney.

THEODORE KINNEY

a witness in behalf of the Plaintiff, being duly sworn, testified as follows: [183]

(Testimony of Theodore Kinney.)

The Court: Will you please state your name?

The Witness: Theodore P. Kinney.

The Court: Age?

The Witness: 40 years old.

The Court: Residence?

The Witness: 3259-A 18th Street.

The Court: Honolulu?

The Witness: Honolulu, T. H.

The Court: Occupation?

The Witness: Police officer, City and County of Honolulu.

The Court: You are a citizen of the United States?

The Witness: Yes, sir.

The Court: Only?

The Witness: Beg your pardon?

The Court: Only?

The Witness: Only.

The Court: Take the witness.

Direct Examination

By Mr. Hoddick:

Q. How long have you been with the Honolulu Police Department, Mr. Kinney?

A. Eleven years, sir.

Q. And with what branch of the department were you serving during July of 1949?

A. In the vice division. [184]

Q. At that time how long have you been with the vice division?

A. Exactly one year.

(Testimony of Theodore Kinney.)

Q. Did you participate in a search of the premises of the rear house at 803 Hausten Street on July 16, 1949? A. Yes, I did.

Q. After that search was concluded did you have occasion to speak with the Defendant, Winston Churchill Henry? A. Yes, sir.

Q. Can you identify the Defendant?

A. Yes, I can.

Q. Will you point him out, please?

A. He is over there in the corner right next to Mr. Soares.

Q. On Mr. Soares' left? A. Yes, sir.

Mr. Hoddick: May the record show that the witness has identified the Defendant, your Honor?

The Court: Yes.

Q. And where did you have this conversation with the Defendant?

A. At the vice room in the Honolulu Police Department.

Q. And approximately what time?

A. Approximately about 4:45 in the afternoon.

Q. That was on July 16, 1949? [185]

A. Yes, sir.

Q. At that time did the Defendant say anything to you concerning the various articles which were found at 803 Hausten Street? A. Yes.

Q. What did he say?

A. He said that everything that happened out at the premises at 803 Hausten Street "I am responsible for." And everything that was found on the premises.

(Testimony of Theodore Kinney.)

Q. He said, "I am responsible for everything that was found on the premises"?

Mr. Soares: We object to that as leading and suggestive.

The Court: Sustained.

Q. (By Mr. Hoddick): Insofar as you can, Officer Kinney, give the Defendant's exact words.

A. "Everything that was found on the premises at 803 Hausten Street I am responsible for."

Q. In your presence did the Defendant at any time say anything about the—withdraw that. In your presence did the Defendant at any time on that day state where he was living?

Mr. Soares: Objected to as leading and suggestive. Let the witness testify as to the conversation

The Court: Sustained. [186]

Q. (By Mr. Hoddick): Will you relate to the Court and Jury, Mr. Kinney, what else you heard the Defendant say down at the police station on July 16, 1949?

A. The Defendant stated, said that he was living at 803 Hausten Street.

Q. And when did that happen?

A. That was about two months before this.

Q. No, no, when did he state that?

A. At the same time we talked at the police vice squad room at the police station.

Q. Did he say how long he had been living there?

A. About two months prior to the arrest.

Mr. Hoddick: No further questions.

The Court: Cross-examination?

(Testimony of Theodore Kinney.)

Cross-Examination

By Mr. Landau:

Q. Mr. Kinney, you testified in the District Court of Honolulu some time ago with reference to these same premises, did you not?

A. Yes, sir.

Q. And at that time I was the attorney representing Mr. Henry? A. Yes.

Q. Right. And the question of the residence came into the—and the question of the residence came into question in [187] that hearing, did it not, Mr. Kinney? A. I believe it did.

Q. And at that time did you say anything about the fact that the Defendant had told you that he was living at 803 Hausten Street?

A. I don't recall.

Q. Isn't it a fact——

A. The question wasn't apparently put to me at that time.

Q. I see. Isn't it a fact that you testified in that case that the Defendant resided at 803 Hausten Street because you had seen the black Packard there on three occasions in the two weeks prior to July 16th?

A. That question up there, you asked me how long we had been casing that place.

Q. Just a minute. Answer my question. Didn't you testify down there that this was the Defendant's residence because you had seen this black Packard

(Testimony of Theodore Kinney.)

in front of the premises on three different occasions for a period of two weeks prior to July 16th? You remember my asking that question and your answer?

A. I remember something, a question similar to that.

Q. And do you remember, Mr. Kinney, my asking you whether you went by there every day and you testified that you went by most every day during your tour of duty, just drove [188] by that house?

A. I said occasionally I did.

Q. And during these occasions that you went by you noticed that black Packard there three times?

A. About three times.

Q. And it was on that statement which you gave, which you based your statement, that the Defendant resided there?

A. Yes. No. But at the station I talked to Mr. Henry he——

Q. Please, Mr. Kinney, answer my question.

The Court: Let him answer the question.

Mr. Landau: May the question be read to him?

(The reporter read the last question.)

The Court: Referring to the statement in the District Court?

Mr. Landau: Yes.

A. Well, I based my opinion that he resided there also by observations.

Q. That is, you saw the car there?

A. Yes, yes, I saw the car.

(Testimony of Theodore Kinney.)

Q. And that is all you testified to at that hearing with reference to the residence? You didn't once mention anything about a statement which the Defendant made to you, isn't that correct?

A. Not at the station. The question wasn't put up [189] to me.

Q. Maybe you don't understand me. During this hearing in the District Court—you know which one I am referring to now?—did you once make mention in your testimony that you were basing your opinion that the Defendant lived at 803 Haus-ten Street on a statement which he had made to you?

A. No, I didn't say, I didn't make that statement.

Q. And you remember I was questioning you at considerable length on that particular matter?

A. Yes.

Q. And you didn't mention that once down there? A. Because you didn't ask me.

Q. Because I didn't ask you? I did ask you how you knew that the Defendant lived there and you gave me your answer, didn't you, Mr. Kinney?

A. Yes, I gave you an answer.

Q. You gave me an answer, and that answer was that you had seen the Packard there three times in a period of two weeks?

A. Yes, about three times.

Q. And in answer to the question which I put to you you did not say that the Defendant had told you that he was living there?

(Testimony of Theodore Kinney.)

Mr. Hoddick: Is that a question, Mr. Landau?

Mr. Landau: It is a question. [190]

A. You didn't put a question like that across to me.

Q. Didn't you just a minute ago admit when I asked you the question as to how you knew that the Defendant lived at 803 Hausten Street and you said I did ask you that question?

A. I guess—well, the way how you phrased that other question is a little different. That's why my answer is different.

Q. Well, at any rate, to sum it up, the only answer you gave to my question how you knew that the Defendant lived at 803 Hausten Street was that you had seen the car there three times over a period of two weeks prior to July 16, 1949? A. Yes.

Q. And at that time you did not either answer a question or volunteer the question that the Defendant had told you that he had lived there?

A. No, I didn't volunteer that information then.

Q. And you didn't know, of course, that when I was examining you down there I wanted all the information about how you knew that the Defendant lived at 803 Hausten Street?

A. Apperently you wanted all the answers.

Q. Yes, I wanted an answer, didn't I, Mr. Kinney, isn't that correct? A. Yes.

Q. And I wanted an honest answer, a fair answer, didn't [191] I, Mr. Kinney? A. Yes.

Q. I didn't get it, did I?

(Testimony of Theodore Kinney.)

A. You didn't ask that question, that's why.

Q. Are we playing a game when I cross-examine you, Mr. Kinney?

A. No, sir. I don't think so.

Mr. Hoddick: I object to that as argumentative. Mr. Kinney, when I stand up don't answer any questions until we thrash out whatever my objection is.

Q. (By Mr. Landau): Now, Mr. Kinney, you knew at that time that Helen Thomas was in custody——

The Court: What time are you talking about?

Mr. Landau: About 4:45 p.m. of July 16th

Mr. Hoddick: Objection, your Honor. I don't think this falls within the proper range of cross-examination. It is immaterial to the issues in this case.

The Court: Sustained.

Mr. Landau: I think it is very material, if the Court pleases. I am sorry I didn't get my rebuttal to the argument soon enough. I'd like to be permitted before your Honor rules on it.

The Court: All right.

Mr. Landau: Rather than have the Jury excused, may we [192] be permitted to approach the bench and discuss it?

The Court: All right.

(Counsel and Court confer.)

The Court: The ruling is cancelled. You may proceed.

(Testimony of Theodore Kinney.)

A. Yes, he was in custody at that time.

Q. And Henry the Defendant, knew that she was in custody? A. Yes.

Mr. Hoddick: Objection. This witness can't possibly know what Henry knew at that time.

The Court: He said he did.

Mr. Hoddick: Has he answered the question? I didn't hear it.

The Court: Yes, he did.

Mr. Hoddick: Withdraw the objection.

The Court: So I now understand both the witness and the Defendant knew at the time in question that Mrs. Thomas was then in custody.

Q. Now, as a matter of fact, Mr. Kinney, this conversation that you had down there with Mr. Henry was in the course of your investigation concerning the possession of a gun?

A. Two guns.

Q. All right, two guns. But that is what your investigation concerned itself with, isn't that right?

A. Yes, sir.

Q. And you knew that when Mr. Henry was answering your questions he was answering the questions with reference to the subject matter of your investigation?

A. Well, he was answering questions in general. The questions I was putting across to him was in general. I mean the whole thing that happened out at Hausten Street.

Q. With reference to the items which you were investigating, isn't that correct, Mr. Kinney?

(Testimony of Theodore Kinney.)

A. Yes, I was talking about guns, but——

Q. And you knew he was talking——

Mr. Hoddick: Let him finish.

The Court: Finish your answer.

A. ——but this statement he had given to me was given voluntarily by him.

Mr. Landau: O.K. No further questions.

Mr. Hoddick: No further questions.

(Witness excused.)

Mr. Hoddick: Your Honor, at this time the Government rests in this case.

The Court: Very well.

Mr. Landau: If the Court please, we are somewhat taken by surprise that the Government is resting at this time. May we have a short recess?

The Court: Yes. [194]

(A short recess was taken at 2:48 p.m.)

The Court: Note the presence of the Jury and of the Defendant together with his attorneys.

Mr. Hoddick: May it please the Court, I should like to recall Mr. Carr to the stand for about two or three more questions. I understand that the Defendants have no objections. I also must unfortunately advise the Court that Mr. Carr has already departed for the far side of the island and I therefore respectfully ask for a continuance until Monday morning.

Mr. Landau: We have no objection, if the Court pleases.

(Testimony of Theodore Kinney.)

The Court: Well, there is another witness you were going to recall by the name of Shaffer.

Mr. Hoddick: Mr. Shaffer will not be recalled.

The Court: Very well. With the understanding that you are going to rest after you recall Carr for one or two questions and thereafter you have prepared and are ready to present motions that you have in mind.

Mr. Landau: Yes, your Honor.

The Court: We will at this time adjourn until Monday morning at ten. And as we do so, I recall to mind with the week-end coming up the admonition which I have several times given the Jury during the course of this trial, which I am sure they remember the specific details of. And I will not [195] repeat them other than to say, do not discuss this case, period, or listen to anyone else discussing it, period, or read of anyone's discussion of it, period. All right.

(The Court adjourned at 3:10 p.m.) [196]

January 9, 1950

The Clerk: Criminal No. 10,253, United States of America vs. Winston Churchill Henry, for further trial.

The Court: Note the presence of the jury and of the Defendant, together with his attorneys. Are the parties ready?

Mr. Landau: Yes, if the Court pleases. If the Court pleases, before any further testimony is taken,

(Testimony of Theodore Kinney.)

the defense in this case moves for a mistrial on the grounds of the newspaper reports which were in yesterday afternoon's and this morning's Advertiser. If the Court please, I do not have them available, but I believe the Court has them and is familiar with them, and with the Court's permission may I request that the articles which your Honor has be admitted into evidence for the purposes of the argument, for the record.

The Court: I do not have them handy, but I can supply them. You refer to the Advertiser, do you not?

Mr. Landau: Yes, yesterday morning, Sunday, the 8th of January, and this morning. This is yesterday's, if the Court please. May I introduce in evidence this morning's.

The Court: Yes, the one is the Star Bulletin. I have it for a different purpose.

Gentlemen of the Jury, did any of you read in Sunday's and this morning's Honolulu Advertiser the articles that Mr. [197] Landau is referring to? If so, will you please raise your hand.

Mr. Wells: Your Honor, those are the articles that dealt generally——

The Court: Yes, Mr. Wells.

Mr. Wells: Dealt generally with the question of narcotics in Honolulu?

The Court: Yes. Mr. Mosher, you raised your hand.

Juror Mosher: Yes, sir, I read the one in this morning's paper, sir, not yesterday morning's.

(Testimony of Theodore Kinney.)

The Court: Do you wish to ask Mr. Mosher any questions

Mr. Landau: No, your Honor.

The Court: Do you?

Mr. Hoddick: No, your Honor. I would like to examine this morning's article.

The Court: You realize, do you not, Mr. Mosher, and gentlemen of the jury, that these articles, which I do not want you to read, should there be any additional ones during the course of this trial, have no relevancy to the case which you gentlemen under your oaths are trying on the evidence which is presented here in court and in court alone.

You realize that, Mr. Mosher?

Juror Mosher: I didn't hear the statement. [198]

The Court: You realize that these articles, one of which, namely, this morning's, you say you have read and any others that may be published during the course of this trial, which I do not want any of you to read, and which, if I had known they were coming, I would have covered by my admonition and instruction, these articles have no relevancy to the case which you gentlemen are trying upon your oaths as jurors and trying only and solely and exclusively upon the evidence which is introduced here in court before your eyes and in your hearing. You realize that?

Juror Moser: Yes, sir.

The Court: As a result of reading this morning's article in the Honolulu Advertiser, Mr. Mosher, have

you been prejudiced one way or another to the point where you cannot now give the defendant a fair trial and the Government a fair trial?

Juror Mosher: No, sir.

The Court: Well, do you want to say something?

Mr. Hoddick: I was just going to submit the matter and point out to your Honor that this morning's article contains no prejudicial remarks.

Mr. Landau: That is correct. This morning's didn't, but yesterday's did.

The Court: Yes. Well, to repeat myself, and this is to continue, as is my other instruction to you, I add to [199] that general instruction that I do not want you to read anything currently published of the nature of the series that is now being published in the Honolulu Advertiser on the subject of narcotics during the course of this trial. You can pile them up and read them after the trial, but not during the trial. I am satisfied that there is no basis for a motion for a mistrial on the grounds stated, and it is therefore denied.

Mr. Landau: I didn't hear you.

The Court: I am satisfied that there is no basis for the motion for a mistrial and therefore it is denied.

Mr. Landau: May we have an exception.

The Court: Certainly. The same goes without saying that should any other newspaper undertake such a series of articles, or article, that this instruction is broad enough to cover any publication, whether it be in the form of newspaper or magazine

or radio, or anything of the sort, or lecture. All right.

Mr. Hoddick, I believe you wish to recall Mr. Carr for one or two questions.

Mr. Hoddick: That is correct, your Honor.

GILBERT J. CARR

recalled as a witness on behalf of the Plaintiff, having been previously duly sworn, was examined and testified further as follows: [200]

The Court: Mr. Carr, you are the same Mr. Gilbert J. Carr who heretofore has testified in this case?

The Witness: That's right.

The Court: I remind you that you are still under oath.

You may take the witness.

Direct Examination
(Continued)

By Mr. Hoddick:

Q. Mr. Carr, what is heroin?

A. Heroin is diacetyl morphine hydrochloride, which is derived from morphine, which is in turn derived from opium.

Q. And what is cocaine?

A. Cocaine is derived from the leaves of the cocoa plant.

Mr. Hoddick: No further questions.

The Court: Cross-examination.

Mr. Landau: No questions.

The Court: You are excused.

(Witness excused.)

Mr. Hoddick: The Government will now rest its case, your Honor.

Mr. Landau: If the Court pleases, in accordance with the suggestion made last week, I have a number of motions to make, and since the motions must be made in the presence of the jury, but argued out of the presence, may I make all [201] the motions at the present time in the presence of the jury so the jury won't have to keep coming back for each motion?

The Court: Yes, if you will go slowly so I can jot them down, too.

Mr. Landau: The defense now moves, if the Court pleases, to strike all the testimony of Government witnesses relating to acts of, and conversations with, the defendant that are in any way incriminatory which occurred after the service of the search warrant at 803 Hausten Street, for the reason that at the time of the search and investigation thereafter the defendant was then under an illegal arrest, and hence anything that was said by him or done by him is presumed to have been done or said under duress and not free and voluntary.

Move to strike the testimony of Officer Kinney, if the Court pleases, especially that portion of his testimony in which he testified about a conversation between himself and the defendant at the vice squad room on July 16, 1949, at or about 4:45 p.m., wherein the defendant is alleged to have stated that

he was responsible for everything at 803 Hausten Street, for the reason that, as Mr. Kinney testified, he was then conducting an investigation concerning certain guns, and the questions put to the defendant and the defendant's answers thereto related specifically to these guns and hence could have no possible bearing on, or admissible as an admission [202] in this case, or to any matter which was not then under investigation by Mr. Kinney.

We move to strike the testimony of Mr. H. A. Patterson, if the Court pleases, in which he testified concerning the making of a demand of the defendant for the production of certain forms on September 27, 1949, and giving him until September 30 to produce those forms, for the reason that the demand was made after the indictment was returned by the grand jury; and, even though Mr. Patterson may himself not have known that an indictment had previously been brought, the demand was made in the presence and at the request of Mr. Wells, who knew that the indictment had, in fact, been returned; for the further reason that at the trial of the case the only evidence of nonpayment of the tax was Mr. Patterson's testimony, which was not and could not have been available to the grand jury, and hence at the time of the indictment there was, in fact, no evidence of any violation of the law; for the further reason that the time given by the witness to the defendant to produce the forms was not reasonable under the circumstances; and for the further reason that the demand having come after the

indictment was in effect required the defendant to give testimony against himself; and for the further reason that there is no evidence that Mr. Patterson in any way informed the defendant as to the law and the requirement that such forms be produced or the effect of such failure. [203]

We move for a directed verdict now, if the Court pleases, as to both counts, for the reason that there is absolutely no direct evidence as to the violation of the defendant, that the only evidence which the Government has tried to produce, as was admitted by the Government during the argument on the motion for a bill of particulars, was the presumptions arising from possession, and the Government has failed completely to show that on July 16, 1949, the defendant was found in possession of any of the articles mentioned in either count of the indictment, for the reason that possession, to be incriminatory, must be personal and exclusive, neither of which has been shown by the Government.

We make a specific motion for a directed verdict as to Count 1, if the Court pleases, in addition to reasons given on the motion for a directed verdict as to both counts; we move for a directed verdict as to Count 1 for the reason that there is a variance between the indictment and the proof, for the reason that there is no evidence that defendant was found in possession of any of the articles mentioned in said count, nor that the said articles did not come from an original stamped package, for the reason that the evidence is silent as to any purchase by the

defendant of these articles as is charged in the indictment, and is silent as to any dealings therein; that the so-called presumption of the statute is not a presumption by a rule of evidence shifting [204] the burden of going forward. It is not evidence of an act which the jury must find beyond all reasonable doubt, to wit, that the defendant did, in fact, purchase these articles on or about July 16, 1949. And for the further reason that the evidence, giving the Government every possible and conceivable benefit, at best raises two theories, one consistent with innocence, the other with guilt, and under the law the theory consistent with innocence must be accepted by the Court.

We move for a directed verdict as to Count 2, if the Court pleases, in addition to the grounds given as to the motion for a directed verdict as to both counts; we move for a directed verdict as to Count 2 for the reason that there is no direct evidence that the defendant was a transferee or required to pay the tax, nor is there any evidence that the defendant was found in possession of any of the articles mentioned therein, that there is no proper evidence as to the demand by the Collector to produce the order forms; and, of course, if my motion to strike Mr. Patterson's testimony is granted, there is no evidence at all of the demand and therefore no presumption whatsoever; that the presumption, if any, is not evidence of a fact, which the jury must find beyond all reasonable doubt, to wit, that the defendant was in fact a transferee and required to pay the tax.

Giving the Government's evidence every possible benefit, the evidence at best raises two theories, one consistent with [205] innocence, the other with guilt, and under the law the theory consistent with innocence must be accepted by the Court.

The Court: Are you prepared to argue these at this time?

Mr. Landau: Yes, your Honor.

The Court: Very well. To hear argument on these motions I will excuse the jury, but before I do so, have you any thought as to how long you will need to present your argument? In other words, should I excuse the jury until 2 o'clock?

Mr. Landau: I think it might be more convenient for the jury to do so, than, say, to come back at 11:30 or quarter to 12 and stay maybe twelve to fifteen minutes.

The Court: What do you think?

Mr. Hoddick: I think that is the proper course to follow, your Honor.

The Court: That strikes me as being sensible also. I will excuse the jury at this time until 2 o'clock; unless you hear to the contrary I will expect you at 2 o'clock. Should we not need your services, you will be notified, but anyway my guess is that even for disposal of the motion it must be done before the jury, so they have got to come back at 2 o'clock anyway.

Gentlemen of the jury, subject to the continuing admonitions and instructions I have so many times given you during [206] the course of this trial, you

are excused until 2 o'clock, during which time I will hear the lawyers on these motions. You may step out.

(Jury excused.)

(Argument by Counsel.)

(At 12:30 p.m. an adjournment was taken until 1:30 p.m.)

Afternoon Session

The Court: Very well, in this case again note the continued absence of the jury while we hear argument on these motions.

(Further argument by Counsel.)

(Recess had.)

The Court: Note the presence of the jury and of the defendant, together with his attorneys.

The motions are denied and exceptions granted on each and every ground.

Do you wish to make an opening statement?

Mr. Landau: No, your Honor.

The Court: Very well. Call your first witness.

AGNES L. KELLETT

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

The Court: Will you please state your name? [207]

The Witness: Agnes L. Kellett.

(Testimony of Agnes L. Kellett.)

The Court: And you may tell me your age or that you are over twenty-one.

The Witness: I am over twenty-one.

The Court: Do you live here in Honolulu?

The Witness: Yes, I do.

The Court: And you are employed?

The Witness: I am employed as custodian of records at the Rent Control.

The Court: City and County of Honolulu?

The Witness: City and County of Honolulu.

The Court: You are a citizen of the United States?

The Witness: Yes, I am.

The Court: Only?

The Witness: Only.

The Court: Take the witness.

Direct Examination

By Mr. Landau:

Q. Now, Mrs. Kellett, I think you said you were custodian of records at Rent Control.

A. Yes.

Q. And you were subpoenaed to appear here to-day with records concerning 803 Husten Street?

A. Yes, the rear house.

Q. What? [208] A. The rear house.

Q. The rear house at 803 Husten Street?

A. Yes.

Q. Do you have those records with you?

A. Yes, I have.

(Testimony of Agnes L. Kellett.)

Q. Now, examine these records, Mrs. Kellett, and can you tell us from the examination of the record here who, on or about the 18th of June, 1949, became the tenant of the rear house at 803 Hausten Street? A. Mrs. Helen Thomas.

Q. Helen Thomas. And the date was 18th of June, 1 believe? A. June 18, 1949.

The Court: June 18?

The Witness: 1941.

The Court: Let me get that.

The Witness: Mrs. Helen Thomas was the tenant.

The Court: All right.

Q. (By Mr. Landau): Now, are those the records kept as a result of an ordinance of the City and County of Honolulu? A. Yes, Ordinance 941.

Q. And they are kept in the ordinary course of business as a result of that ordinance? A. Yes.

Q. Now, from your records can you tell whether there [209] was a change in the ownership of the premises, the rear house, 803 Hausten Street?

A. I have here a record, a memorandum here from Mrs. Olson. Mrs. Olson was the former landlord of that house on 803 Hausten. Would you like—or would you want me to read it?

Q. Would you read that?

A. This is dated September 15, 1949. (Reading.)

“I sold my rental property to Dr. and Mrs. Borja August 15, 1949.

“Mrs. Edna D. Olson

“Address 1856 Kapahulu Blvd.”

(Testimony of Agnes L. Kellett.)

The Court: And you may tell me your age or that you are over twenty-one.

The Witness: I am over twenty-one.

The Court: Do you live here in Honolulu?

The Witness: Yes, I do.

The Court: And you are employed?

The Witness: I am employed as custodian of records at the Rent Control.

The Court: City and County of Honolulu?

The Witness: City and County of Honolulu.

The Court: You are a citizen of the United States?

The Witness: Yes, I am.

The Court: Only?

The Witness: Only.

The Court: Take the witness.

Direct Examination

By Mr. Landau:

Q. Now, Mrs. Kellett, I think you said you were custodian of records at Rent Control.

A. Yes.

Q. And you were subpoenaed to appear here to-day with records concerning 803 Hausten Street?

A. Yes, the rear house.

Q. What? [208] A. The rear house.

Q. The rear house at 803 Hausten Street?

A. Yes.

Q. Do you have those records with you?

A. Yes, I have.

(Testimony of Agnes L. Kellett.)

Q. Now, examine these records, Mrs. Kellett, and can you tell us from the examination of the record here who, on or about the 18th of June, 1949, became the tenant of the rear house at 803 Hausten Street?

A. Mrs. Helen Thomas.

Q. Helen Thomas. And the date was 18th of June, 1 believe?

A. June 18, 1949.

The Court: June 18?

The Witness: 1941.

The Court: Let me get that.

The Witness: Mrs. Helen Thomas was the tenant.

The Court: All right.

Q. (By Mr. Landau): Now, are those the records kept as a result of an ordinance of the City and County of Honolulu?

A. Yes, Ordinance 941.

Q. And they are kept in the ordinary course of business as a result of that ordinance?

A. Yes.

Q. Now, from your records can you tell whether there [209] was a change in the ownership of the premises, the rear house, 803 Hausten Street?

A. I have here a record, a memorandum here from Mrs. Olson. Mrs. Olson was the former landlord of that house on 803 Hausten. Would you like—or would you want me to read it?

Q. Would you read that?

A. This is dated September 15, 1949. (Reading.)

“I sold my rental property to Dr. and Mrs. Borja August 15, 1949.

“Mrs. Edna D. Olson

“Address 1856 Kapahulu Blvd.”

(Testimony of Agnes L. Kellett.)

She was the landlord as of June 18, 1949.

Q. (By Mr. Landau): And under the——

The Court: Just a minute, please. This memorandum that you have in your file from a Mrs. Olson is dated September——

The Witness: September 15, 1949.

The Court: Saying that she sold the property in question?

The Witness: As of August 15, 1949.

The Court: Thank you.

Q. (By Mr. Landau): And, Mrs. Kellett, when there is a change of ownership, under the law, does a new tenancy record have to be kept with the new owner? A. Yes. [210]

Q. At my request did you check to ascertain whether or not Dr. and Mrs. Borja have listed——

The Court: Where did they come from?

Mr. Landau: The present owners as of September 15.

The Court: She sold it to Dr. and Mrs. Borja?

Mr. Landau: Borja.

The Court: Excuse me. Read the question.

(Question read.)

Q. (Continuing): ——these same premises, the rear house on 803 Hausten Street as a rental unit?

A. We have made several attempts to find this Dr. and Mrs. Borja, and up to this present date we have never found them, and we don't know whether there is any such person as that. We haven't found

(Testimony of Agnes L. Kellett.)

them yet, but the ordinance here says that within five days after renting to a new tenant or after a new landlord has acquired the housing accommodation, the landlord shall file a notice on a form provided therefor upon which he shall obtain the tenants' signature.

Q. In other words, your records do not show that there are any other tenants registered except Helen Thomas, on June 18, 1949?

A. 1949, that is right.

Q. For these premises. A. Yes.

Q. Under the law which you have just read, if there is [211] a new owner, there must be a new tenancy slip? A. Yes.

Q. And you have no such new tenancy slip?

A. No.

Mr. Landau: That is all.

The Court: Cross-examination.

Cross-Examination

By Mr. Hoddick:

Q. Mrs. Kellett, who files these records with your office? A. The landlord.

Q. Does the tenant ever come into your office?

A. No. See, the landlord comes to the office and files a petition with us, and we set a maximum rent ceiling to the housing accommodation and if, in the event the house is rented, a tenancy slip is given to the tenants who at that time occupy the house, and

(Testimony of Agnes L. Kellett.)

it must be filed with us within five days. And we have made several attempts to find out who this new landlord is, and we have not as yet found him.

Q. I understand that, Mrs. Kellett, but now say you have a tenant—— A. Yes.

Q. (Continuing):——in a house, at the time that the house is first rented—— A. Yes. [212]

Q. (Continuing):——that tenant's name will be filed with your office by the landlord? A. Yes.

Q. Now, suppose there is a change of tenancy and you have a new tenant?

A. Then the landlord comes down and files another petition with us—I mean another tenancy paper saying that tenant is no more a resident of that certain house, with the signature of the tenant on these tenancy cards.

Q. That is what the ordinance requires?

A. Yes. I have a copy of it. Do you want to see it?

Q. No, thanks. Do your records show who pays the rent on the premises?

A. It doesn't say who pays the rent, but we assume that if a tenant signs a card that naturally she pays the rent, but we have no records of that. All we are interested in——

Q. That is merely an assumption on your part?

A. Yes.

Q. I see.

Mr. Hoddick: No further questions.

Mr. Landau: Mrs. Kellett, perhaps it will be for your information to know Dr. Borja, the dentist,

(Testimony of Agnes L. Kellett.)

has offices up in the block above the Silent Barber Shop on Hotel Street.

The Witness: I would appreciate if we can find it, [213] because we have made several attempts.

Mr. Landau: You check. You might find him there. That is all. Thank you, Mrs. Kellett.

The Court: Excused.

(Witness excused.)

The Court: Next witness.

Mr. Landau: Defense rests, if the Court please.

The Court: Very well. Rebuttal?

Mr. Hoddick: No, your Honor.

The Court: Are your requested instructions ready for presentation?

Mr. Landau: Yes, your Honor.

The Court: All right. At this time I am going to excuse the jury until 1:30 tomorrow afternoon. Between now and that hour I will confer with Counsel with regard to their requested instructions and at 1:30 you will report to the Court, at which time the Court will convene and Counsel will present their respective arguments to you, after which the Court will instruct you as to the law, and thereafter you will for the first time enter upon your deliberations after arriving at the jury room. The evidence in the case is now completed.

This is a special emphasis added to the instructions which I have previously given you not to discuss this case with anyone, even fellow jurors, or to read anything about this [214] case or anything re-

lated to it, or to listen to anyone discussing it. In general, isolate yourselves from anything, either directly or indirectly, relating to this case, for as yet, though the evidence is now in, you are not at liberty to deliberate, and only after you have heard argument and the Court's instructions and you retire to the jury room and actually go into session as a jury for the purpose of deliberating are you at liberty then for the first time to discuss this case with your fellow jurors.

So at this time the Court will adjourn for the day and will immediately see Counsel in chambers for the purpose of settling instructions. So until 1:30 tomorrow afternoon you are excused.

(Thereupon, at 3:00 p.m. an adjournment was taken until January 10, 1950, at 1:30 p.m.) [215]

* * *

January 10, 1950

The Clerk: Criminal No. 10,253, United States of America vs. Winston Churchill Henry, for further trial.

The Court: Note the presence of the jury and the defendant, together with his attorneys. At this time, the evidence being concluded, it is in order for the attorneys to present their respective arguments to the jury, based upon the evidence, and at this time, gentlemen of the jury, if you will give the attorneys your undivided attention, they will present their argument.

Mr. Hoddick.

(Argument by Mr. Hoddick.)

(Argument by Mr. Soares.)

(Recess.)

The Court: Note the presence of the jury and of the defendant, together with his attorneys. You may, Mr. Hoddick, present your closing argument.

(Argument by Mr. Hoddick.)

The Court: Gentlemen of the jury, if I may now have your undivided attention, I will give you the rules of law in the form of instructions which are to guide you in arriving at a verdict in this case. The rules of law which I shall give you will enable you to test, measure, evaluate, [216] and weigh the evidence which you have heard here in this Court room, and on the basis of which, and that alone, you are required, under your oaths, to arrive at a verdict, if it is at all humanly possible.

Like every criminal case, this is an important case. It is important to both the Government and to the defendant. If the defendant, upon the evidence, in your minds has been proven by the Government beyond a reasonable doubt to be guilty as charged, the Government wants you to return a verdict of guilty as charged. If, on the other hand, the Government's proof fails to measure up to the standard required by the law and he has not been shown by the evidence to be guilty as charged beyond a reasonable doubt, both the Government and the defendant and the law require that you return a verdict of not guilty.

In a criminal case the burden of proof, the burden of proving the charges laid in the indictment, is upon the Government, and it never shifts. In other words, the Government has the burden in this case, as in every criminal case, of proving to your satisfaction, by the evidence, beyond a reasonable doubt that the defendant is guilty as charged. Anything short of that requires, as a matter of law, that you acquit the defendant. That is the kind of a government we live under, thank God. There are some countries where the rule is that a man is presumed to be guilty until he proves [217] himself innocent. That is not the kind of law that we have. It is just the opposite in our country. A defendant is presumed innocent until he is proven guilty by the evidence beyond any and all reasonable doubt, and that presumption of innocence is a real, substantive provision of law which remains with the defendant and abides with him until you gentlemen, by the evidence, are satisfied beyond all reasonable doubt that he is, if he is, guilty as charged.

Let us first talk a little bit about what is evidence, what kinds of evidence there are. There are two kinds: direct and positive evidence and circumstantial evidence. Positive evidence is the testimony of a person who heard something or saw something or said something or felt something; that is to say, something that can be readily perceived by the faculties. Circumstantial evidence is proof of such facts and circumstances surrounding an alleged crime from which a jury may infer others and con-

nected facts which usually and reasonably follow according to the common experience of mankind. Circumstantial evidence is regular and competent in a criminal case, and when it is of such a character as to exclude every reasonable hypothesis except that the defendant is guilty, it is entitled to the same weight as direct evidence. Circumstantial evidence, in any sense, will have to be considered by you in connection with other evidence produced, but to be of value the circumstances [218] must be consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence, and inconsistent with every other reasonable hypothesis except that of guilt. In other words, the circumstantial evidence must meet these requirements in that they must add up to proof beyond a reasonable doubt.

Now, you have heard a good deal about reasonable doubt, and you are probably wondering what it is. It is a little bit difficult to define, but there is no mystery about it. A reasonable doubt is just such a doubt as the term implies. It is a doubt for which you can give a reason. It must not arise from any merciful disposition or kindly, sympathetic feeling, or desire to avoid performing a possibly disagreeable duty. It must be a substantial doubt, such as an honest, sensible, fair-minded man might, with reason, entertain, consistent with a conscientious desire to ascertain the truth and to perform a duty. It is such a doubt as would cause a man of ordinary prudence, sensibility, and decision, in de-

termining an issue of great concern to himself, to pause or hesitate in arriving at his conclusion. It is a doubt which is created by the want of evidence, or maybe by the evidence itself. It is not, however, a speculative, imaginary, conjectural doubt. It is not incumbent upon the Government, in the trial of a criminal case, to prove a defendant guilty beyond all possibility of doubt. A juror is satisfied beyond a reasonable [219] doubt when he is convinced to a moral certainty of the guilt of the party charged.

And now, while I am on the subject of evidence, let me also advise you as to your, gentlemen of the jury, being the exclusive and sole judges of the credibility of the witnesses. That you are, and you are also the sole and exclusive judges of the weight of the evidence and of the facts in this case. It is your exclusive right to determine from the appearance of the witnesses on the witness stand, their manner of testifying, their apparent candor or frankness, or lack thereof, which witness or witnesses are more worthy of credit, and to give weight accordingly.

In determining the weight to be given the testimony of the witnesses, you are authorized to consider their relationship to the parties, if any, their interest, if any, in the result of this case, their temper, feeling, or bias, if any has been shown, their demeanor on the witness stand, their means and opportunity of information, and the probability or improbability of the story told by them.

If you find and believe from the evidence that any

witness in this case has knowingly or wilfully sworn falsely to any material fact in this trial, or that any witness has knowingly and wilfully exaggerated or suppressed any material fact or circumstance in this trial for the purpose of deceiving, misleading, or imposing upon you, then you have a [220] right to reject the entire testimony of such witness, except in so far as the same is corroborated by other credible evidence, or believed by you to be true.

If, during the course of this trial, by any remark or action of mine, or ruling during the course of the trial, you think I have any opinion as to what the outcome of this case upon the evidence should be, I want you to disregard it. I would have the right, under the law, to comment upon the evidence, but that I shall not do. It is not my purpose to invade your province, for you and you alone, as I have told you, are the final, exclusive judges of the facts established, if at all, by the evidence; so, therefore, if you have any idea that I have any opinion about this case, as to the guilt or innocence of this defendant, I want you to disregard it. You must arrive at your own independent conclusion from the evidence which has been presented, and all of the circumstances detailed by the witnesses.

And now let me come to certain specific instructions which have been requested, but before I do that, let me take the indictment in hand and once again, as I did at the outset of the trial, acquaint you with its specific language. Before I do so, let me advise you, as a matter of law, that this indict-

ment is not evidence in the slightest. It is a mere formal accusation by the Government; and, consequently, that being its nature, and it not being evidence, no juror should [221] permit himself to be in any way influenced because of, or on account of, the indictment brought against this defendant. As I have mentioned, the burden of proof is never, under our laws, upon the accused to establish his innocence, or even to disprove the facts necessary to establish the crime for which he is indicted. He is not required to put in any evidence at all upon the subject. The burden of proof, as I have told you, is upon the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime.

Now, to the indictment, as I was about to come to it. The indictment provides in form as follows:

“Count 1: The Grand Jury charges that on or about the 16th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Winston Churchill Henry, alias ‘Frisco Shorty,’ did knowingly, wilfully, unlawfully, and feloniously purchase a salt, compound and derivative of opium, to wit, 946 capsules each containing heroin; and a derivative of cocoa leaves, to wit, 250 grains of cocaine, which heroin and cocaine was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), Title 26, U. S. Code.

“Count 2: The Grand Jury further charges that

on [222] or about the 16th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Winston Churchill Henry, alias 'Frisco Shorty,' the identical person named in Count 1 of this indictment, being then and there a transferee required to pay the transfer tax imposed by Section 2590(a), Title 26, U. S. Code, did knowingly, wilfully, unlawfully, and feloniously acquire and otherwise obtain a quantity of marihuana, to wit, 787 grains of bulk marihuana and 35 marihuana cigarettes, without having paid such tax, in violation of Section 2593, Title 26, U. S. Code."

Thus you see, gentlemen, that the accusations contained in this indictment, the charges, are two in number, counts 1 and 2. And as to the details alleged in this indictment, the counts of which I have just read to you, the Government is required to prove those charges beyond a reasonable doubt.

Under the law, gentlemen, no jury should convict a person charged with a crime upon mere suspicion—not only should not, but must not—however strong that suspicion, or simply because there is a preponderance of all of the evidence in the case against him, or simply because there are strong reasons to suspect him guilty. What the law requires before a person can be convicted of a crime is not suspicion, not mere probabilities, but, as I have told you, proof which excludes all reasonable doubt as to innocence. [223]

When faced with this indictment, the defendant entered a plea of not guilty, and such plea puts in

issue the allegations contained in the indictment and requires the Government to prove such allegations to your satisfaction beyond all reasonable doubt before a verdict of guilty can be returned against the defendant.

As I have told you, and will tell you again, the defendant enters upon the trial presumed to be innocent of the charge until he is proven guilty beyond a reasonable doubt by the evidence. A defendant is not required to prove himself innocent or to put in any evidence at all upon that subject. In considering the testimony in the case, you must look at such testimony and view it in the light of that presumption of innocence with which the law clothes the defendant, and you must remember that it is a presumption that abides with him throughout the case until the evidence convinces you to the contrary beyond all reasonable doubt.

And as I have already told you, but will repeat, this presumption of innocence is not a mere form. It is not something you can cast aside at your pleasure, but it is an essential, substantial part of the law of the land, and is binding upon the jury in this case, as in all criminal cases. It is your duty as jurors to give the defendant in this case the full benefit of this presumption, and to acquit the defendant, unless the evidence in the case convinces you of his guilt as [224] charged beyond all reasonable doubt.

Again, at the risk of being slightly repetitious, let me tell you that in criminal cases, even when the

evidence is so strong that it demonstrates the probability of guilt of the party accused, still if it fails to establish beyond a reasonable doubt the guilt of the defendant in the manner and form charged, then it is your duty, as jurors, to acquit the defendant and to bring in a verdict of not guilty.

As I have mentioned, mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that upon the doctrine of chances, it is more probable that the defendant is guilty. To warrant a conviction of the defendant he must be proved to be guilty beyond all reasonable doubt when all of the evidence in the case is considered together.

Similarly and related to the subject that I have just instructed you upon, put differently, one accused of crime cannot be convicted unless the evidence excludes every reasonable hypothesis of innocence of the crime charged. And, in this case, if, from all the evidence, you should find that the defendant's guilt is not established beyond a reasonable doubt, you must find him not guilty even though you should believe that the evidence points with equal force to his guilt.

Otherwise stated, the rule of law is that if two reasonable constructions can be placed on the evidence, one [225] of which is consistent with defendant's innocence of the crime charged or even leaves a reasonable doubt in your minds as to his guilt even though the other is equally consistent with his guilt, you must still find him not guilty.

This is a humanitarian provision of law which is

not to be lightly disregarded by you, and you must keep it in mind at all times and give the defendant the benefit of it, all of which is another way of saying, as I have told you, that the Government must prove its charge beyond all reasonable doubt.

Mr. Soares: May I interrupt you. My copy of the instruction clearly says "regarded."

The Court: Excuse me?

Mr. Soares: Says "regarded," not "disregarded."

The Court: Yes, it says "regarded," and I maintain it should be "disregarded." It is not to be disregarded.

Mr. Soares: Correct.

The Court: I have told you the nature of a reasonable doubt, but as it is of great importance in every criminal case that you clearly understand reasonable doubt, it is not amiss to define it from several standpoints and in a variety of words, so let me once again, pursuant to request, define for you in another form the meaning and significance of the term "reasonable doubt."

A reasonable doubt may arise from the evidence or it [226] may arise from the lack of evidence. It is such a doubt as would cause you, as reasonable men, to hesitate to act upon it in matters of importance to you.

It is difficult to define in exact terms the nature of a reasonable doubt. It may be said to arise from a mental operation and exists in the mind when the judgment is not fully satisfied as to the truth of a

criminal charge or the occurrence of a particular event, or the existence of a thing. It is a matter that may be determined by the jury, acting under the obligations of their oaths and their sense of right and duty. If, from an examination and consideration of all the facts and circumstances in evidence taken in connection with the charge of the court, you are not satisfied beyond a reasonable doubt that the defendant is guilty as charged in the indictment, you will return a verdict of acquittal.

I have already told you the nature of evidence, direct and circumstantial. I am going to omit that.

Concerning Count 1 of this indictment, which is a charge framed under the Harrison Anti-Narcotics Act, the law invoked provides as follows:

“It shall be unlawful for any person to purchase, sell, dispense or distribute any of the drugs mentioned in Section 2550(a)——”

2550(a) includes both heroin and cocaine. Let me go back over that. [227]

“It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special

taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax."

There follow two exceptions. I shall not read them, other than to indicate they apply to drugs dispensed pursuant to prescriptions by doctors and registered dealers, or dispensed directly to patients by physicians, dentists, veterinary surgeons, or other practitioners in the course of professional practice, or dispensed for legitimate purposes.

As you gather from my reading of the indictment and from listening to the arguments of counsel, Count 1 of this indictment charges the defendant with unlawfully purchasing cocaine and heroin, but you haven't heard a word in the evidence about any purchase. The reason for that is contained in the statute itself, for in order to prove Count 1 the evidence must satisfy you beyond a reasonable doubt as to the following: [228]

(1) That the drugs in question were heroin and cocaine. I will comment on the evidence to this extent, that there is no dispute in the evidence that the drugs in evidence are as alleged in the indictment, namely, heroin, cocaine, and marihuana.

(2) Under Count 1 it is alleged and must be proven that the defendant purchased these drugs, cocaine and heroin.

(3) The Government must prove, by the requisite degree of proof, this additional fact, that that purchase was not in or from an original stamped package.

Now, if the evidence satisfies you beyond a reasonable doubt that there was an absence of Internal Revenue stamps upon these drugs and further satisfies you beyond a reasonable doubt that the defendant had possession of these drugs, then there arises as a matter of law a presumption that there exists on the part of the defendant a *prima facie* violation. In other words, proof beyond a reasonable doubt of possession of these drugs from which are absent tax-paid stamps creates a *prima facie* case of a violation of this particular section of the law which I have just read to you.

What does that mean? It means that at that point, though the burden of proof remains the same, and remains continually, as it does, upon the Government, that at that point, if you are satisfied beyond a reasonable doubt of the things that I have mentioned, and this presumption arises, there is cast [229] as a matter of law upon the defense the burden of going forward with the evidence to explain satisfactorily that possession. If that burden of going forward and satisfactorily explaining possession is not discharged by the defense, then as a matter of law that presumption takes the place of proof as to the purchase, that it was a purchase not in or from an original stamped package and warrants a conviction. That is why you have heard the lawyers tell you that the pivotal point in this case is a question of fact, as well as law, as to whether or not the evidence satisfies you beyond a reasonable doubt that the defendant did have pos-

session of these drugs and that those drugs did not have upon them Internal Revenue stamps indicating that they were tax-paid.

This is one of the few instances in the criminal law where there is such a presumption, but I repeat that it does not disturb the burden of proof, but it is simply a presumption, which, if erected upon the facts found by you, places a burden of explanation upon the defendant. The law amounts to this: that one proven to be in possession of drugs has a burden of going forward and explaining that possession as being lawful, innocent, or unconscious.

Well, I might as well come to Count 2, which is slightly different, and tell you about that.

Count 2 is under the Marihuana Act. It provides as follows: [230]

“It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590(a)——” and 2590(a) imposes a tax on the transfer of drugs such as marihuana. Now, to repeat:

“It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590(a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590(a).”

Now, what does that mean? It means that as to Count 2 of this indictment the Government must prove the following:

They must prove first that the drug is marihuana. That has been proven, as I have told you.

It must next prove beyond a reasonable doubt that the defendant is a transferee required to pay the tax imposed upon the transfer of marihuana.

It must next prove beyond a reasonable doubt that the defendant acquired this marihuana without having paid the tax imposed by law.

Now, if the Government proves to your satisfaction beyond [231] a reasonable doubt that the defendant had in his possession this marihuana, and it further proves by the same degree of proof the defendant's failure, after reasonable notice and demand by the Collector of Internal Revenue, to produce the order form covering this marihuana and required to be retained, then, if those things are proved, as I read to you in the statute, there arises a presumption of guilt and a liability for the tax. And, again, the defendant may explain to your satisfaction his possession. If he does not, this presumption, if it is erected by the evidence to your satisfaction by the requisite degree of proof, that presumption, I say, establishes a *prima facie* violation of this law and takes the place, as a matter of law, of proof that the defendant was a transferee required to pay the tax and that the defendant acquired the drug without having paid the tax.

That, again, is why, as to Count 2, the attorneys

have told you in their arguments that the pivotal point is: Did the defendant, according to the evidence, have, beyond all reasonable doubt, possession of the marihuana?

Now, returning to the requested instructions, some of which duplicate what I have already told you, but it is rather involved, so I will, nevertheless, despite my instructions, read these additional requests to you.

As indicated in the first count of the indictment, the defendant is charged with the unlawful purchase of cocaine [232] and heroin. The statute defining this alleged crime makes unexplained possession of heroin or cocaine and the absence of appropriate tax-paid stamps therefrom prima facie evidence of their unlawful purchase. With this statutory presumption it is not necessary that the Government introduce any evidence relating directly to the purchase if the Government has satisfied you beyond a reasonable doubt, by the evidence which it did adduce, that the defendant had conscious possession of the heroin and cocaine described in Count 1 of the indictment, and of that possession there has been no satisfactory explanation by the defense. This means that if you are convinced beyond a reasonable doubt that the defendant had in his conscious possession on or about July 16, 1949, heroin and cocaine, to which the appropriate tax-paid stamps were not affixed, you must find the defendant guilty of the offense charged in the first count of this indictment.

This seems repetitious, but I had better read it nevertheless.

You are instructed that as to Count 1 the defendant is charged with knowingly, wilfully, unlawfully and feloniously purchasing a salt, compound and derivative of opium, and the Government must prove beyond all reasonable doubt all of the material allegations in said count. Those material allegations are: (1) the drug is as alleged, namely, heroin, cocaine, or marihuana, depending on the count of the indictment; [233] (2) that the items mentioned in the count were not at the time of purchase in the original stamped package and further that they were not from the original stamped package; (3) that the defendant did in fact purchase on or about July 16, 1949, the items listed in Count 1. If you have a reasonable doubt as to any of the above material allegations, you must acquit the defendant as to Count 1.

Before I forget it, with respect to the statutory burden placed upon the defense of going forward with the evidence, once you are satisfied beyond a reasonable doubt as to possession of the alleged narcotics and the absence of tax-paid stamps, I want to make it clear that that is an obligation of going forward on the part of the defense, to explain that possession to your satisfaction as being lawful, innocent, or unconscious, and that does not mean that the defendant, who is presumed innocent until proven guilty beyond all reasonable doubt, has any obligation to take the stand and testify in his own

behalf. It simply means that somebody on the side of the defense must, in the face of that situation, come forward with a satisfactory explanation of that possession. From the fact that the defendant has not testified in his own behalf you are not allowed to draw any inferences whatsoever.

Well, this I think I have covered, but I had better read it. You are instructed that as to the charge in Count 1 the statute states in effect that the "absence of appropriate [234] tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found." This means that before this theory can be considered by you you must first find beyond all reasonable doubt that there was an absence of appropriate tax-paid stamps and, secondly, that the defendant was in possession of them at the time that they were found. If you have a reasonable doubt as to either of these matters, you must acquit the defendant for the reason that there is no evidence of a direct purchase by the defendant.

This next request relates to Count 2. I think I have satisfactorily explained the operation of that law without reading that again. I am going to pass it, unless you think it is not already covered. Do you want me to read it?

Mr. Hoddick: No, your Honor.

The Court: As to Count 2 the defendant is charged with being a transferee required to pay the tax imposed by law and acquiring and other-

wise obtaining the articles mentioned therein without having paid such tax, and, as I have told you, the Government must prove beyond all reasonable doubt that the defendant was in fact a transferee of the articles mentioned therein and was, therefore, required to pay the transfer tax. If you have a reasonable doubt as to the allegation that he was a transferee, you must acquit the defendant. This, like the other repetitious instructions that I have read, must be [235] taken together with the law I have given you as to what happens if the presumption is found by you beyond a reasonable doubt to be erected from a finding by you beyond all reasonable doubt of the fact of possession, and if, as I have told you, that presumption comes into operation and there is no explanation of the possession, then that takes the place of proof of the things I have just outlined to you the Government must prove.

Now, let's get to this matter of possession, which the attorneys are in agreement is the key to this case.

To support a conviction of the charges contained in this indictment you must be convinced beyond a reasonable doubt that the defendant had possession of the narcotics described in the indictment. That possession must have been conscious and it must have been either actual or physical, or it may have been constructive possession. In determining whether the defendant had conscious possession, either physical or constructive, of the narcotics, you

are instructed that possession means the holding or retaining of property in one's control, and that one has possession of personal property when it is under his dominion and subject to his control. This means that the possessor must have had the power to exclude others having no better claim thereto from exercising dominion and control over the property. Possession once acquired may be preserved by the mere intention of the possessor, and in the [236] absence of actual or physical possession, if the possessor still intends to retain control and dominion over the property, he is deemed to have constructive possession of that property.

One or two other definitions of possession. Possession means control of a thing to the exclusion of other persons having no better claim to it. In other words, before you can arrive at a decision with reference to the fact of possession beyond all reasonable doubt, you must find either that the defendant was in physical and actual possession of the articles mentioned in the indictment or that the evidence shows directly or indirectly that those articles belonged to him or that they were on the premises within the exclusive, ultimate control of the defendant. If you have any reasonable doubt as to this situation or if you have any reasonable doubt that the premises in which these articles were found were in the exclusive, ultimate control of the defendant, you must acquit him of the charges. In connection with the question of possession, mere knowledge of the whereabouts of the articles or the

knowledge of their contents or recognition of their contents after they have been found is not sufficient to base a finding of possession.

With respect to the quantity of heroin and cocaine alleged in Count 1 of the indictment, it is not incumbent upon the Government to prove the exact quantity specified therein. If you are convinced beyond a reasonable doubt by the evidence [237] that the defendant had in his conscious possession 915 capsules of heroin and any quantity of cocaine less than 250 grains, that is sufficient to support a verdict of guilty as to the first count of the indictment. In other words, the important thing is that there was established by the evidence beyond all reasonable doubt the fact of the possession of some cocaine and heroin. The exact quantity, the exact weight, is not of particular importance.

Similarly, as to the marihuana, with respect to the quantity of marihuana alleged in Count 2, it is not incumbent upon the Government to prove the exact quantity specified therein. If you are convinced beyond a reasonable doubt by the evidence that the Defendant unlawfully acquired or obtained a lesser quantity of marihuana cigarettes and a lesser quantity of bulk marihuana, that is sufficient to support a verdict of guilty as to the second count of the indictment.

As I have told you already, the defendant is not compelled to testify in his own behalf. He is presumed to be innocent until he is proven guilty beyond all reasonable doubt. The burden of proving him guilty is upon the United States.

The fact that the defendant has not testified in his own behalf shall not be considered by you in determining the question of his guilt or innocence.

A person under arrest has a constitutional privilege not to make any statement, and his failure to make a statement [238] cannot be considered by you as evidence in arriving at your verdict, nor can his silence or lack of denial of an accusation made to him or in his presence be considered by you in any manner in arriving at a verdict against him. You are also instructed that you may, however, consider free and voluntary admissions, if any, made by the defendant and free and voluntary acts of the defendant performed, if any, while he was under arrest. In other words, a person under arrest has a constitutional right to refrain from saying or doing anything. He cannot be compelled to say or do anything. But that does not mean that if he wishes to, he may not say or doing anything, if he does so without compulsion or coercion and wishes to do so.

Finally, gentlemen, as you know, the only verdict known to our law is a unanimous verdict of the jury. A unanimous agreement of the jury is necessary for a verdict. This is in no wise to be considered by you as a justification for abandoning your individual convictions or beliefs or doubts. While a unanimous verdict is required, it must be arrived at by each juror's voting as he believes the law and the evidence justifies him to vote. While, of course, each of you must give due regard to the

opinions of the others, you are not required to substitute the opinion of a fellow juror for your own simply for the purpose of arriving at a unanimous verdict.

To illustrate, if after full and fair deliberation, one [239] or more of you believe from the law and the evidence that the guilt of the defendant is established so clearly and convincingly as to leave no reasonable doubt in your minds, you are not to vote "not guilty" merely because a majority of the jury does not believe the defendant guilty or has a reasonable doubt of his guilt. So, too, if one or more of you, after a fair and impartial discussion with your fellow jurors, are not convinced from the evidence and the law beyond a reasonable doubt that defendant has been proved to be guilty of the crime charged, you are not to vote "guilty" merely because a majority votes that way. The "unanimous" verdict of the jury must be the sum total of your individual beliefs and is not to be arrived at by an arrangement of mere compromise.

In other words, each and every one of you, in order to convict, must be satisfied beyond a reasonable doubt that under the law as I have given it to you and the evidence and the facts as you find them from the evidence that the defendant is guilty beyond all reasonable doubt. Otherwise, he must be acquitted, if there is not such a unanimous finding.

One of you asked about the defendant's business and I told you that I would not answer that question, or words to that effect. What the defendant's

business is has no relation to this case, and as I have told you, he is not required to testify, and the fact that he has not testified is not to form the basis of any adverse inference against him. He is [240] charged in the words of the indictment, and we are not interested in what his business is. So, too, you gentlemen are only interested in the question of: Is he guilty or not guilty, established by this evidence and the law as I have given it to you? As to what happens after that is no concern of yours. You are simply called upon to answer questions as to both counts of this indictment as to whether the evidence establishes his guilt beyond all reasonable doubt. If it does not, you are to return a verdict of acquittal, and he walks out of the court room free.

(Court and Counsel confer.)

The Court: At this time I will ask the jury to step outside of the court room momentarily while I hear the lawyers on various points of law briefly. Bear in mind as you go that the case is not yet yours for discussion or deliberation, so maintain the continued silence that I have admonished you to maintain; but the time is close at hand when you can talk among yourselves.

(Exit jury.)

The Court: The jury being absent, are there any exceptions that the defense wishes to take to my charge to the jury?

Mr. Landau: Yes, your Honor, we except to the Court's refusal to give defendant's requested instructions Nos. 1, 2, 3, 6, and 8, and to the giving of the prosecution's [241] instructions Nos. 9 and 10.

The Court: Very well.

Mr. Landau: For the reasons, in all cases, that were discussed and stated for the record in chambers while the instructions were being discussed.

The Court: The record may show.

(Following is the record as to objections made in chambers during the settling of instructions, morning session, January 10, 1950:)

As to Government's Instruction No. 9:

"Mr. Landau: Consistent with our motion for directed verdicts, if the Court pleases, we can't agree.

"The Court: On the point of variance?

"Mr. Landau: On the point of variance. That is, that we contend that variance is fatal."

As to Government's Instruction No. 10:

"Mr. Landau: We take the same position as we did to No. 9, if the Court pleases, on the ground that we feel that there is a great variance and that proof of a lesser amount does not support the indictment."

The Court: Very well. Have you anything you wish to say?

Mr. Hoddick: Nothing.

The Court: Call the jury back.

(Jury returns.) [242]

The Court: Very well, at this time, Mr. Clerk, you may swear the Marshal and his assistant to take charge of the jury.

(Marshal Otto F. Heine and George Bruns sworn.)

The Court: All right, gentlemen of the jury, the time is now at hand when you may retire to the jury room to deliberate upon your verdicts. I say "verdicts" because there are two counts to this indictment. A form of verdict has been prepared and you will fill in the blanks to conform to the findings that you make.

Your first order of business will be to elect from amongst your number one to serve as your foreman. I will allow you to use this court room as the jury room because I am ashamed, as always, of our real jury room, which is upstairs, in a dilapidated condition. Therefore, I will direct the Marshal to clear this court room and to close all avenues of anyone's hearing what goes on in this room, closing the necessary windows, doors, and transoms. The jury may have access to my lavatory, and he will lock the door to my chambers.

After this room is transformed to a jury room and the Marshal steps out of the door, then for the first time you may sit down and start deliberating. I don't want any discussions going on or talking about this case while he is clearing the room to make it available for you gentlemen as a jury room.

If any of you have any telephone calls you want to make— [243] Mr. Andre. What is the nature of your 'phone call?

Juryman Andre: My wife.

The Court: Any objection to his calling his wife?

Mr. Landau: No, your Honor.

The Court: I take it to tell her you will probably be late, or something of that sort?

Juryman Andre: I intend to ask her to take my boy to the football game this evening.

The Court: You may go in the company of the Marshal to the telephone to make one telephone call to your residence to leave that message, or you can have the Marshal do the 'phoning for you.

Juryman Andre: That would be satisfactory, your Honor.

The Court: Perhaps that would be better. Do you want to give him the tickets, too?

Juryman Andre: I have a nickel here.

The Court: There is no charge for the call.

Juryman Andre: Oh, I was looking for a nickel.

The Court: There is no charge for the call. But there is no problem about the tickets that you want your wife to use? You don't have them in your back pocket?

Juryman Andre: No. I would like her to make arrangements to take my son this evening because he is very anxious to see these players. [244]

The Court: I think my son is, too, and no doubt Mr. Landau's and Mr. Fairbanks' also.

Are there any other messages about family or car

or traffic parking regulations or anything of that sort?

Juryman Kramer: My car is down on the highway where it has been parked all the time. I suppose it is all right.

Marshal Heine: If it is tagged, I think I can get him off.

The Court: They tell me you shouldn't worry about it. I don't know why, but I would tell the Marshal where your car is and he can go turn the lights on.

Juryman Kramer: It is a gray Chrysler.

The Court: Between here and the Territorial Court Building?

Juryman Kramer: That's right.

The Court: Do you get a ticket every day?

Juryman Kramer: I went to the Police Station and they told me to leave a little note in the car, and that is what I have been doing.

The Court: All right. Any other messages?

(No response.)

The Court: Very well. I don't want any contact with this jury. I want this oath that you gentlemen, as marshals, have taken strictly adhered to. If there is any [245] problem, you come and see me.

Marshal Heine: If the Court please, if they want anything, they will have to put it in writing, and I will so instruct them.

The Court: The jury may take to the jury room with them the evidence and a copy of the indictment, if they so desire. Do you wish it?

Jury: Yes.

The Court: Very well. At this time the court will stand at recess. Oh, yes, a copy of the verdict form.

(Thereupon, at 4:40 p.m., January 10, 1950, court was recessed while the jury retired to deliberate.) [246]

(The Court reconvened with the Jury present at 5:05 p.m., January 10, 1950.)

The Court: Note the presence of the Jury and of the Defendant together with his Attorneys. I have been handed by the Marshal a note from your Foreman, gentlemen, which I have exhibited to the Attorneys. It reads:

“We want the Judge’s instructions regarding possession, what is possession.

“/s/ LEO F. ANDRE,
“Foreman.”

Mr. Clerk, take this. Rather than give you the typewritten instructions I deemed it advisable to bring you in court for the purpose of finding out exactly what it was that is bothering you on the subject of possession. Am I correct in gathering from your message, Mr. Andre, that the Jury would like the Court to again define the nature of possession?

Mr. Andre: Your Honor, a number of the Jurors—

The Court: Just state what the question is with-

out telling me what they think one way or another. What is the problem?

Mr. Andre: We would like to have a definition of the word "possession." You read it in your instructions but there are differences of opinion as to what constitutes possession.

The Court: All right. Possession is both a factual and a legal matter. It is what we might call a mixed question [247] of law and fact. You know when you have possession of something that is in your hands, for then and there you have it within your control and custody, and have the ability to exercise exclusive dominion, power and control over it.

We are talking here in this case about the possession of a thing. We are not talking about the possession of real estate. We are talking, to repeat, about the possession of the alleged narcotics charged in this indictment. That comes in the nature, within the classification of a chattel or a personal property, so to speak. It is not real estate, in other words. Basically, the thing to bear in mind is that as to a thing, a chattel, like your watch, your fountain pen, it is in your possession when you have actual custody of it and thus the ability to exercise control, exclusive control and dominion, power over it. If you have left it on your desk in your office and do not have it currently with you in your hand you still have possession of your pen; only that kind of possession is known as constructive possession. It is something that is yours. It is something which you have had in your actual possession, put down

without any intent to abandon it, and nobody else has picked up and claimed to exercise power of dominion and control over it.

So, too, for example, as you sit here in the courtroom, of the personal things in your home which are yours. You are not at home holding them in your hands, but as you sit [248] here in court, those things which are yours in your home are in your constructive possession. You have not abandoned your intention to control the disposition of those personal items, that personal property; nor has anyone else taken charge and taken the things into his or her actual possession with intent to exclude you from your exercise of power and control over them.

Similarly the juror whose car is parked out here in the street. He is not in the car but it is his car. When he parked it there he didn't abandon it. And if it is still there, as we presume it is, that car is still in his possession in point of law, and that we call constructive possession as distinguished from actual possession which is something in hand.

Let me reread to you the instructions that I gave you previously on this very subject.

“Possession must have been conscious and it may have been either actual or physical or it may have been constructive * * *”

Both of which terms I have defined for you in different language just a moment ago.

“* * * In determining whether the Defendant had conscious possession, either physical or con-

structive of the narcotics, you are instructed that possession means the holding or retaining of property in one's control, and that one has [249] possession of personal property when it is under his dominion and subject to his control. This means that the possessor must have had the power to exclude others having no better claim thereto from exercising dominion and control over the property. Possession once acquired may be preserved by the mere intention of the possessor, and in the absence of actual or physical possession, if the possessor still intends to retain control and dominion over the property, he is deemed to have constructive possession of that property."

Translated again, that means the extra pair of shoes that you have at home in the closet that you intend to wear tomorrow; they are still your shoes, even though you sit here in court and you have constructive possession of them. You have had actual possession of them. It is not necessary that you continue to wear those shoes in order for them to be yours and in your possession. They are still under your control and dominion. And this was the other definition of possession which I read to you:

"Possession means control of a thing to the exclusion of any other person having no better claim to it. In other words, before you can arrive at a decision with reference to the fact of possession beyond all reasonable doubt, you must find either that the Defendant was in physical and actual

possession of the articles mentioned in the indictment or that the evidence shows directly or indirectly that those [250] articles belonged to him or that they were on the premises within the exclusive, ultimate control of the Defendant. If you have any reasonable doubt as to this situation, as to whether the evidence shows directly or indirectly those articles belong to him, or if you have any reasonable doubt that the premises in which these articles were found were in the exclusive, ultimate control of the Defendant, you must acquit him of the charge. In connection with the question of possession mere knowledge of the whereabouts of the articles or the knowledge of their content or recognition of their content after they had been found, is not sufficient to base a finding of possession."

Let me explain that last language. Supposing I know as a fact that Mr. Thompson, the Clerk of our Court, has a box of candy in his desk. The mere fact that I know that he has it doesn't mean that I have possession of it. Nor does the fact if that box of candy, for example, should be shown to me, does the fact upon that showing that I know it is candy mean that it is mine, that I have had possession of it. Possession is basically a question of fact, and so far as we are concerned here it is a colorless fact. We are not talking about whether this possession is guilty or innocent possession. The question is, has the Government proven beyond any or all reasonable doubt the fact of possession by

this Defendant of the narcotics charged in this indictment? [251] Bear in mind, as I have indicated before, the distinction between personal property which is subject to actual and constructive possession and, for example, the possession of personal property in a house which arises from control of the real estate. They are two separate things. We are talking about basically the possession of personal property. But like the case of your shoes at home in the closet, if it is your house you still have constructive possession of those shoes in your closet, even though you do not now have them on your feet here in court. Let me read you another definition of the word "possession." For the record, I am reading from 49 Northeastern 2nd, 130, which quotes the restatement——

Mr. Landau: I'm sorry, your Honor, I was not able to get it.

The Court: 49 Northeastern 2nd, at page 130, which quotes the restatement——

"A person who is in possession of a chattel is one who (a) has physical control of a chattel with the intent to exercise such control on his own behalf, or, otherwise than as servant, on behalf of another, or, (b) has been in physical control of a chattel with intent to exercise such control, although he is no longer in physical control, if * * *" —like your second pair of shoes— [252] "* * * he has not abandoned it, and no other person has obtained possession."

And finally,

“If the person has the right as against all others to the immediate physical control of a chattel, if no other person is in possession.”

Are there still questions on what we mean by “possession”? If not, I think that will suffice.

Mr. Landau: May I take exception to the Court’s instructions on the ground that the instructions as given are misleading and not a proper statement of the law as I understand it to be.

The Court: You may.

Mr. Landau: From my study and examination of the discussion.

The Court: You may. Very well. The Court will again stand at recess to await the Jury’s verdict. The Court will be cleared as before, subject to the same instructions.

(The Jury retired again to deliberate.)

(The Court reconvened at 10:50 p.m. with the Jury present.)

The Court: Note the presence of the Jury and of the Defendant together with his Attorneys. I am in receipt of a message from the Jury’s Foreman asking, 1, permission for the Jury to retire for the night and, 2, to have a transcript [253] of the Court’s instructions ready for the Jury when they begin deliberations in the morning. As to request No. 1, I think it is a very sensible request and I am going to grant it. I think a good night’s sleep will do you all good, especially since that clock up there

is deceptive. It is not running at all. And, Mr. Marshal, you will forthwith make arrangements to take the Jury to a hotel, to have the authority to give them a midnight snack, if they wish it, and you may also ascertain from the jurors if they wish you to make any calls for tooth brushes and pajamas and slippers and robes and that sort of thing, and to notify their families that they will not be home but they will be in good care and custody under your supervision. And, gentlemen of the jury, as you retire for the night, though you will not be allowed to go to your homes, you will to a limited extent be separated by the necessities of hotel accommodations, but otherwise not separated; you are not, from the moment you are excused for the purpose now of retiring, to in any way continue your discussions of this case, not even with your fellow roommates should you have one over night. Your fellow roommate is a juror. In other words, forget this case from the moment, from this moment until tomorrow morning, until you start your deliberations again. You yourself can be thinking about it but I don't want you to be discussing it with anyone, with any one of your fellow jurors. I would suggest [254] that you be ready to come to court for such disposition as I make of your second request at, shall we say nine; are you all early risers? Is nine too early or would you rather have it at ten?

A Juror: Nine is all right.

The Court: Is that agreeable to the Attorneys?

Mr. Landau: Yes, your Honor.

The Court: All right. I am not going to comply with your second request in full, as you have requested it, for several reasons. One is that it is almost humanly impossible to have a transcript of my instructions ready by the morning because, like yourself, the court reporters are practically exhausted. And I think also it is preferable to convene court and to go over certain instructions and do as I did this afternoon when you requested additional instructions on the subject of possession. So, as I approach this request No. 2 at this moment, I will plan to discuss with you before you resume deliberations the substance of the Court's instructions in the morning at nine. Now, are there any other matters?

Marshal Heine: If the Court please, I'd like to have my chief deputy, Thomas Clark, sworn in in place of George Bruns.

The Court: Well, where is Mr. Bruns?

Marshal Heine: I sent him home. [255]

The Court: Well, I didn't relieve him. He was sworn to take charge of the Jury. You had no right to excuse him.

Mr. Clark: He is ill.

Marshal Heine: He is ill.

The Court: That is entirely different. I'd like to know about those things. You yourself have been in charge of this Jury continually?

Marshal Heine: Yes.

The Court: All right. Please let me know when

those things happen immediately. Mr. Clark may be sworn in place of Mr. Bruns. Mr. Bruns is relieved.

(Thomas Clark, Chief Deputy Marshal, sworn to take charge of the Jury.)

The Court: All right. The Court will at this time stand adjourned for the day until nine o'clock tomorrow morning. Bear in mind the admonitions that I have given you, and as the Court adjourns you will have to stay here in the courtroom until the Marshal is ready to take you to the hotel. But you can speak to him about the telephone calls, and so forth, that you want him to make in your behalf. It is best that he make them. But Mr. Clark will assist and there should be no great delay while those telephone calls are made.

A Juror: Would you allow me to make any personal calls? The reason is that the Marshal tried to get my home and it is impossible, and I have a car parked in the Sears-Roebuck lot [256] with the key in the back, and I would like to contact someone in there but in all probability I will have to talk to two or three people before I get the right person to go out and find out whether the car is there. And they will probably either have to make an arrangement to get the car away from there or something, unless I leave it there, but I don't know if it is allowed.

The Court: Well, I think in this instance it is all right to let him, under the Marshal's supervision, to make the calls himself. Are there any other car problems or any other problems?

Mr. Landau: I was going to suggest that I know there are some cars parked, at least one of them, right on Milalani, and they can't park there after one or two o'clock without getting a ticket.

The Court: Well, as to that type of situation, give your keys to the Marshal and he will make arrangements to take care of the car for you. You can make all those necessary arrangements. I don't want you making extraneous telephone calls. I give you blanket authority to tell the Marshal just what you want him to do, and I think you will find him very cooperative. I appreciate your frank disclosure, but he will definitely make those calls for you. All right, then, until tomorrow morning at nine.

(The Court adjourned at 11:10 p.m.) [257]

January 11, 1950

The Clerk: Criminal No. 10,253, United States of America vs. Winston Churchill Henry.

The Court: Note the presence of the jury and of the defendant, together with his attorneys.

Last evening at approximately 11 I sent the jury to retire under the supervision and in the custody of the Marshal. All twelve of them are now present. I trust that they have had a good night's sleep.

Before directing them to resume deliberations, I want to come now to the second request which the jury made last evening in addition to permission asked relative to retirement.

The second request was, as you all remember, that there be made available to the jury this morning a

transcript of the Court's instructions, and as I indicated last evening at the late hour, (1) it was not physically possible to have a transcript of the instructions prepared by this morning, and (2) even if it were, I was not sure that I would give you those instructions in written form. As I indicated, or intimated, last evening, in lieu thereof I am going to go over the instructions this morning in my own language and words. I am also going to review some of the evidence for you, but as I do, I want you to bear in mind, as I have told you before, that, though I have the right to comment upon the evidence, I [258] will endeavor to refrain therefrom; but, in any event, should I go over the line and tend, in your opinion, to comment upon the evidence, I want you to remember that it is not what I think or what my opinion may be, but a question to be decided by you. The evaluation of the evidence, the recollection of the evidence, and the findings of fact from the evidence which you are to make are exclusively within your province, and you are to disregard any opinion that you might think that I have.

Similarly, as I review some of the evidence, again it is not what I recall, it is what you recall that the witnesses actually said.

Now, I spent some hour or more yesterday reading to you instructions that the attorneys on both sides requested that I give you. In addition, I gave you some fundamental, basic instructions of my own, and I analyzed the statutes, two in number, that relate to the two counts of this indictment, in my own

language. It occurs to me overnight that between the language that I used and the language that I was requested to read to you that there was probably too much lawyer's language in there for you to digest as readily as we lawyers are able to digest such language, and, as I have been told very definitely by the Supreme Court of the United States, instructions are for the purpose of helping the jury understand the law in plain, ordinary language so that they can apply it. So it is because I feel that I have been remiss [259] in reducing that law to plain, simple language that I am going to review the substance of my instructions this morning. Before I do so, let it be recorded that with regard to anything and everything I say the defense may have full and complete exceptions. I do not want to be interrupted during the time that I am talking, but at the conclusion of my remarks I will give you ample opportunity to except to anything I do or say, so if you will make notes of what you want to object to, I will give you ample opportunity. I do not accord that same privilege to the Government, because it hasn't the privilege of taking the exceptions to what I say, or if it does, it doesn't do it any good.

As mentioned yesterday by the attorneys and as stressed by the Court, reduced to its simplest language this case boils down to a question for you to determine as to whether or not the defendant had possession, actual or constructive, of the narcotics, drugs, alleged in the two counts of this indictment. That is the pivotal, basic question.

It is relatively a simple question, but it is one which must be decided upon the evidence which you gentlemen have heard here in court in this case, and upon nothing else. As I talk to you this morning, I want you continually to bear in mind what I have told you before, and what I am saying is simply to better enable you to understand what I have said before, for I am not going to say anything different. I am simply [260] saying it in my own language, which I hope will be a bit clearer than the language which I used yesterday.

I simply, therefore, recall to your minds that which remains true, that in this, as in any criminal case, the burden of proof to prove all of the necessary factors to constitute the offense is upon the Government, and that burden of proof does not shift. I have talked yesterday and will today talk about a different kind of a burden, which does not disturb the ultimate burden of proof. This other burden that I have spoken of and do refer to and will explain in greater detail later is simply the burden of going forward with the evidence. Those are technical, legal terms, but I think I can make it clear to you what I mean. I repeat, the burden remains on the Government throughout the case from the beginning to the end. Also, this very real, substantial presumption of innocence surrounds the defendant and remains with him until by the evidence, as measured and tested by the law, you are, if you are, satisfied beyond a reasonable doubt of his guilt as charged.

Let us take up the subject of the law once again as to counts 1 and 2. In order for you to understand it better I will draw you, as I have had to do for myself, a diagram. Mr. Clerk, you make a copy of what I put on the board so that you have a record of it.

The Clerk: Yes, your Honor. [261]

The Court: Count 1 of the indictment, you will recall, deals with two kinds of drugs, heroin and cocaine, and it is alleged by the Government that the defendant purchased a certain quantity of heroin and cocaine.

Now, under the statute, which I have read to you before, and repeat again, it is provided by law that "it shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in Section 2550(a)"—and that includes heroin and cocaine—and remember he is simply charged with purchase—"except" the statute goes or "in the original stamped package or from the original stamped package; * * *" Now, "original stamped package or from the original stamped package" means this: "stamped" refers to Internal Revenue stamps required to be placed upon drugs and the tax paid upon their value in accordance with the statute; and "the original stamped package" means the original package from which they came from the factory; "from the original stamped package" means when they are lawfully dispensed pursuant to prescriptions by a doctor or otherwise directly to a patient from an original stamped pack-

age. You will remember that I mentioned that yesterday, as those are exceptions to the statute, namely, prescriptions and dispensations directly by doctors to patients.

Now let us read this again:

“It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; . . .”

And the statute goes on and says:

“And the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; . . .”

Now, what does the Government have to prove under count 1? It must prove the nature of the drug. There is no dispute in this case that the drugs in evidence are cocaine and heroin.

They must prove that the defendant, as charged, purchased those drugs and at the time of purchase the purchase was not in or from an original stamped package.

As I told you yesterday, we haven't heard a word in this case about purchase. We have heard about whether or not these drugs have Internal Revenue stamps upon them or the containers. There are no Internal Revenue stamps upon these drugs, indicating they were tax-paid. The Government has to prove, as it has, the absence of tax-paid stamps. There is no dispute about that.

Now the Government also has to prove that the defendant had actual or constructive possession of these drugs upon which there were no tax-paid stamps.

I have told you the Government has proven the absence of [263] stamps. Here is the pivotal question: possession.

A Juror: May I sit here. I can't see.

The Court: Certainly. Can you see?

Mr. Landau: I believe I can see all right, your Honor.

The Court: Now, if by the evidence the Government has proved to your satisfaction beyond a reasonable doubt that the defendant, as charged, did have possession of these drugs, there then arises under the law, pursuant to another rule of law, what to the law is known as a presumption of fact, which is a reputable presumption, placing the burden of going forward and explaining satisfactorily that possession as being either lawful, or innocent, or unconscious; lawful, by proving, for example, that it was lawfully acquired; innocent, that nothing was known about it, or that the person didn't know they were drugs; that somebody put them in his pocket and, unknown to him, he was unconscious of carrying them around or having them in his possession. The law then provides that unless that possession is satisfactorily explained, if it is not, then there arises a proposition that that presumption proves and takes the place of independent evidence to prove these two missing links and warrants a conviction.

So you see, as we have said to you, the lawyers and I, the pivotal question is possession. That is how the statute works.

The operation of the other statute under the marihuana act [264] is quite similar. I will just run over it briefly. In essence it is the same. The Government, under this second count has to prove the nature of the drug, which it has proved, and as to which there is no dispute. It has to prove that the defendant was a transferee required to pay the tax imposed on transferees of marihuana. You know what the word "transferee" means. If you transfer something to me, I am the transferee and you are the transferor.

The Government must also prove that the defendant acquired this drug without having paid the tax, and if the Government additionally proves that the defendant possessed the drug and failed after reasonable notice and demand by the Collector of Internal Revenue to produce the order form covering it and required by law to be retained by the transferee—I will just abbreviate that on the board. I repeat, if the Government proves possession and proves also beyond a reasonable doubt the failure of the possessor to produce, after a proper demand, the order form covering that drug, then there arises a presumption, which is reputable, if the defendant in the face of such wishes to go forward and explain that possession, and that presumption, unless explained to your satisfaction, as in the other statute, takes the place of independent, direct proof of these

second and third steps that I have outlined, namely, as the statute says:

“...proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order [265] form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590(a).”

Now, that is, once again, how the statutes operate. Boiled down, in essence the law is that anyone having been proven to be in possession of any drugs has the burden of explaining satisfactorily that possession as being lawful, innocent, or unconscious.

Now, what is the evidence as to possession? For in count 2, like count 1, the pivotal fact which you must be able to find beyond a reasonable doubt to must be able to find beyond a reasonable doubt to exist upon the evidence, is the fact of possession.

Upon what evidence in this case does the Government rely and contend on the basis of which it has proven to your satisfaction beyond a reasonable doubt the defendant had possession? The evidence is all circumstantial save and except as there may be found by you to be any admissions made by the defendant by word or act.

You will remember the definitions which I gave you yesterday of direct and circumstantial evidence, and that circumstantial evidence, to be of merit, must be consistent with each other, various things established by the circumstantial evidence must be

consistent and consistent with no other hypothesis except that of guilt. [266]

You will remember also the ways in which I defined for you the meaning of the term "reasonable doubt." Just briefly, that must be a doubt based upon reason; that it is not an imaginary, speculative doubt; that it may be a doubt created by the lack of evidence or by the evidence itself, but it is a doubt which is based upon reason, and that you are satisfied beyond a reasonable doubt or beyond all reasonable doubt when you are satisfied to a moral certainty.

The evidence upon which the Government relies, as I recall it—and I repeat, it is not what I recall, it is what you recall—but, as I understand it, the Government relies upon the fact that it served a search warrant upon the defendant. You will recall Mr. Wells' testimony that as he approached the defendant and informed him that he had a search warrant for the defendant's premises. The defendant, as I recall the testimony from Mr. Wells, said "OK," or words to that effect, and he and the officers, with Mr. Wells, then went to the rear house at 803 Husten Street here in the City and County of Honolulu. When they got there, the door through which they wished to enter apparently was latched, or locked, or something; in any event, the testimony is that the defendant called to someone inside to free the door in some way so that the people could come in; that they did go in; that there in the living room, Mr. Wells testified, he served the search war-

rant upon the defendant and, as required, undertook to read [267] the search warrant to the defendant. The defendant waived the reading of the search warrant.

Mr. Wells further testified about proceeding upstairs and searching a bedroom, which he said was the defendant's bedroom, which he later also called the mauka bedroom.

Wells further testified that after he was called downstairs by Sasaki to see something found upon the search of his assistants, such as was Sasaki, as they were going downstairs, the defendant being with Wells, Wells placed the defendant under arrest.

The Government further, as I understand it, relies, for whatever value it may have, upon a statement made by the defendant to Wells at the time Wells was estimating the grainage content of that small white bottle, which I understand is cocaine. You will recall Wells testified that he estimated it contained about 200 grains, and the defendant ventured the opinion that it contained more than that, or words to that effect.

Then you will recall the Government relies on another element relating to a closet which Wells testified he wished to search. Upon finding it locked, Wells called upon the defendant for the key. Wells testified that the defendant indicated negatively as to the key. I am not saying one way or another just what the defendant said; that is for you to recall. But there was some problem about the key; let's put [268] it that way, the problem being solved,

according to Wells' testimony, by the defendant's calling upon Mrs. Thomas to produce the key, which was produced. The key fitted the door, the door was unlocked, Wells found inside there something which caused him to make a remark which you will recall, to which the defendant, according to Wells, replied, "That was there when I moved in." I think they called that a panel. I will just put the word panel down there as indicative of what I am referring to. It is for you to remember actually what it was.

Next, the Government places some reliance upon the fact that Wells testified at a point of time near the end of the search he was washing his hands in the kitchen and he remarked to the defendant that he had a nice place here and asked him how long he had been living there, to which the defendant made a reply. What the defendant said you know as well as I. I will label that "washing of the hands incident."

Next, I understand the Government to be placing reliance upon what, at or about that same time that I have just referred to, the defendant said and did with reference to Wells, and to be placing reliance upon it despite the fact that at the time the defendant was then and there under arrest. As I have told you, the law is that a person under arrest is not required, and cannot be compelled, to do anything or say anything that may in any way incriminate him, but that, however, [269] the fact that a person may be under arrest does not preclude him from freely and voluntarily, without compulsion or coercion,

doing or saying anything that he may wish to say. Whether these things that followed the time of arrest were free and voluntary acts of the defendant is for you to decide. The incident that I was about to come to as being the next item upon which I understand the Government relies is the fact that the defendant came to Wells making representations to him that Wells shouldn't take, or need not take, Mrs. Thomas, who was found on the premises, to the police station, or take her somewhere in custody, for the reason that she knew nothing about this stuff. I don't purport to be quoting the defendant's exact words. That is the substance of it, as I recall it; it is for you to recall exactly. Whereupon, Wells asked the defendant whether or not then this stuff was his. Wells testified at that point that the defendant shrugged his shoulders and smiled. Does that have any significance? That is for you to determine. We will put down, for lack of a better label, as the smile and shrug.

Next I understand the Government to rely upon the testimony of Sergeant Kinney. I believe it is sergeant; I don't know what the rank is. But you will recall that his testimony was that on this same day in question, that all of the witnesses had been talking about, at the police station, to which the defendant had by Wells been taken under arrest, [270] Kinney talked to the defendant and the defendant talked to him, and that they were talking about guns. Why they were talking about guns we don't know; it is none of our concern; guns are not a part

of this case. But the testimony of Kinney is that they were talking about guns, and, as they did, Kinney says the defendant said to him that he was responsible for everything that was found there and that he had lived there approximately two months. What was the defendant talking about? What did the defendant mean? What is its weight, significance and value in conjunction with the other things upon which the Government relies is for you to determine, not me.

You will also recall that this same witness Kinney testified that he did not so testify at some proceeding in the district court or police court, the exact nature of which we know not what it was, and it is of no concern to us; but that whatever the proceeding was he did not give this information at that time to Counsel who was questioning him on the subject of whether he knew, or not, where the defendant lived. His answers to the questions along that line, you will recall, were, in substance, to the effect that he didn't so testify because he was not asked. How much weight you are going to place on Sergeant Kinney's testimony is for you to determine, tested and measured by the various tests and measurements I have given you as applicable to all witnesses.

Now, there may be other things that the Government relies upon to establish this fact of possession and as claiming on the basis of which they have proven beyond a reasonable doubt that the defendant had possession, I don't know, but those are the things that occur to me that they are relying upon.

I may be mistaken; there may be more or less. It is for you to determine. In any event, there is no reliance or contention made, as I understand it, by the Government that the defendant was in actual, physical possession of these drugs, such possession as I have of this piece of chalk that I have in my hand.

Their contention and argument seems to be that, putting all of these things upon which they rely together and taking all of the evidence into consideration, they believe that by circumstantial evidence and by acts and actions of the defendant they have, they claim, proven to your satisfaction beyond a reasonable doubt that the defendant did have possession and, if they have, there is a burden of going forward as a matter of law, upon the defendant to explain that possession. That is the Government's contention. Whether the Government is right or not, you, and only you, know and can determine.

What do we have on the other side of the picture? We have, first and foremost, the proposition of law that I have told you about, that the defendant is presumed innocent, that [272] he doesn't have to testify in his own behalf, and that no adverse inference may be drawn by you from the fact that he does not testify. You may ask, How is that so if he has the burden of going forward with the evidence to explain possession if we should find from the evidence beyond a reasonable doubt that he did have possession? The answer to that is: The de-

fendant may testify if he wants to, or he may call others to testify for him and to explain that possession, or he may be satisfied that the Government hasn't proved beyond a reasonable doubt to your satisfaction that he did have possession, and he is willing to take the risk of the opinion that he has to explain anything.

The defendant plead not guilty, and to date, as I understand the evidence, he has not, on his side of the case, admitted or explained, during the course of this trial, any possession of these drugs. The only evidence offered by the defense was that these premises at 803 Hausten Street, according to the records of the local Rent Control office of the City and County of Honolulu were premises owned by some landlord at the time in question by the name of Olson, I believe, and rented by that landlord to this Mrs. Thomas that we have heard so much about. From that it would appear to my mind—but what inference you gentlemen are to draw from it is for you, and you alone, to determine—it would appear to me, I say, that the defendant, by that evidence that Mrs. Thomas was the [273] record tenant, it would seem to me that there was a basis made for a possible inference, which I believe has been argued, that somebody else possessed these drugs. The inference from the defendant's evidence is that Mrs. Thomas possessed these drugs constructively since she was the record tenant of these premises. This is the same Mrs. Thomas that was mentioned throughout the trial as having also been arrested

at the time of the raid, the same Mrs. Thomas that the defendant, according to the testimony, advised not to talk, the same Mrs. Thomas that the evidence may show the defendant begged Mr. Wells not to retain in custody and take to the station.

Neither the defendant nor the Government has produced Mrs. Thomas. As to the weight and significance that you are to attach to the Rent Control records, that is for you to determine. You will recall, however, that Miss Kellett from that office testified that the office had received a memorandum from a Mrs. Olson saying that she had sold the premises as of August to a Dr. Borja, I believe, and that the Rent Control office had not been able to locate that Dr. Borja to date, and that upon the suggestion Counsel made to the witness as to where the Rent Control office might locate this man here in the city and county of Honolulu, the witness indicated she would follow up that suggestion. I repeat, it is for you to determine how much weight you are to place upon this and any other bits of evidence. You, and you alone, are the sole [274] judges of the weight and significance of the evidence and of the credibility of the witnesses.

Over all, both sides approach one aspect of this problem from the same direction. The Government approaches it from two directions. The Government approaches the problem of the house, the real estate, as does the defendant by the testimony which he has produced, that the problem of the house has this significance, as I told you yesterday when we

were defining more specifically the meaning and significance of the term "possession": On the one hand, from its evidence, the Government would contend that if you find beyond a reasonable doubt that, regardless of who the record tenant was, the defendant was in fact the real tenant of these premises, that it may therefore be said, as a matter of law, that he had constructive possession of the contents and articles in, on, and about those premises. With the same rule of law in mind, the defendant comes forward and says Mrs. Thomas was the tenant and therefore, if there was any personal property on these premises, the indications are that she was the one who possessed the contents of these premises and the things in, on, and about them.

The second angle from which the Government approaches this problem is independent of the house and problem of constructive possession. It secondly approaches the problem directly as to these narcotics, from the standpoint of constructive possession of these narcotics separately and [275] independently from the problem of the house and would no doubt have you believe that it has satisfied you beyond a reasonable doubt that from the things that it relies upon, all put together and weighed and assessed and valued and evaluated it has proven that the defendant had knowing, conscious control and dominion and possession of these narcotics, narcotic drugs, upon the basis of which the Government contends the presumption of law that I have spoken of earlier comes into operation.

Over all, what the law is you must take from me as I give it to you, and not from the lawyers. Whether I am correct or incorrect as to what the law is is my responsibility. I believe I have given it to you correctly and clearly and simply, and that as given to you in these instructions, it should be most adequate to enable you to reach a verdict as to counts 1 and 2.

As to what the evidence is, I repeat, you, and you alone, are the judges of it, how much weight and significance you are to give to it. You are the sole judges of the facts and of the credibility of the witnesses. You are to disregard anything you might think I think. You are to arrive at your own independent judgment, and each and every one of you, in order to find the defendant guilty, must be satisfied beyond a reasonable doubt, as the case stands, that the defendant did have possession of these narcotics. If you are not so [276] satisfied, you must acquit.

A form of verdict has heretofore been prepared for you, but it occurs to me that if, for example, that form of verdict does not correspond with what you gentlemen find, you may use your own form of verdict, for the reason that this form of verdict is simply prepared for your convenience, but there is no special significance to the particular form that we have given to you. In fact, you do not have to write out your verdict at all. You can announce it in open court, if you see fit. It is merely a form after all.

With this review of the law and the evidence I will conclude my remarks, unless there are any questions that you wish to ask me.

Mr. Andre.

Juryman Andre: Your Honor, no questions at this time.

The Court: Very well. Do you want to take any exceptions to anything I have said?

Mr. Soares: I think we have some exceptions.

The Court: Do you want the jury excused?

Mr. Soares: Yes.

The Court: Will the jury step out, please.

(Exit jury.)

Mr. Landau: Before I make the exceptions with reference to the Court's instructions at this time, it is [277] unquestionably understood that any exceptions we have made to previous instructions, for the reasons stated in the Court's chambers will be considered as applying to the same instructions.

The Court: Yes.

Mr. Landau: I take exception to your Honor's remarks and instructions to the jury at this time, first, because it has not in any way taken into consideration the facts and effect of the cross-examination of the Government witnesses. I mean, the Court has been completely silent on certain matters which were brought out on cross-examination which were not either cleared, or even mentioned, in the direct examination.

Second, among your Honor's list of items which the Government relied upon to prove possession and

the items which the defendant used to rebut any inference your Honor has been silent, and I know it is not deliberate, it has been completely silent about the testimony of Officer Case to the effect that he was stationed on Kalakaua Avenue at Barbecue Inn for the specific purpose of watching the defendant's residence at 408 Keanianu Street.

We also except to your Honor's remarks to the fact that neither the Government nor the defendant has produced Helen Thomas. There is no duty upon the defendant to produce any witness. The inference is that we have been remiss in our duty. Actually, it is the Government's duty.

The Court: In that connection I had this in mind, [278] that the defense did undertake some discharge of the burden of going forward with the evidence to explain possession.

Mr. Landau: We did explain possession. And we contend continuously the defendant never had possession, and the Court so stated.

The Court: That is right, but what I am directing attention to is what I am talking about, namely, the evidence that the defendant did put on was an endeavor to show by some way or other that somebody else had possession.

Mr. Landau: That is right. At least, he didn't have possession.

The Court: But the one intimated who had possession was not produced by the defendant.

Mr. Landau: Actually, your Honor, the purpose of the evidence was merely to rebut the infer-

ences from the Government's testimony to the effect that the defendant lived there and therefore he was in constructive possession of the narcotics.

The Court: Well, you are basically right. The defendant doesn't have to produce any evidence. If I left that impression, I will correct it when they come back, but what I was talking about and had reference to was in connection with what he did produce to prove the fact that Mrs. Thomas was the tenant. He produced simply records, not the actual tenant. [279]

Mr. Landau: Of course, it is a question of the weight, plus, of course, that coupled with the testimony of Officer Case that he was watching the defendant's residence at 498 Keanianu it is of considerable significant value.

Mr. Hoddick: I would also like to suggest to the Court, of course it is up to the jury to remember what points we made on which we relieved in proving the defendant's possession——

The Court: Yes.

Mr. Hoddick (Continuing): But we consider important the defendant's statement warning Billy Wells not to taste that stuff, that that was dynamite.

The Court: Didn't I mention that?

Mr. Hoddick: No, you didn't.

The Court: I had it on the list.

Mr. Landau: You mentioned the estimate of the grainage, which took place at the same time.

The Court: I dare say they will remember that themselves. I also did stress that I was not pur-

porting to tell them everything, that they are the ones to remember what the evidence was, not me.

Well, the only thing that disturbs me is your Mrs. Thomas' problem. The proposition is this, that the defendant doesn't have to produce any evidence, but if he does produce evidence, they are entitled to measure and test that evidence like any other evidence. [280]

Mr. Landau: That is true. If the defense introduces evidence, it is governed by the same tests as any other evidence is governed, but it doesn't put on the defendant any burden of any testimony whatsoever. It is the Government which has the burden of putting on the evidence, the complete evidence, to show guilt beyond all reasonable doubt, and it is not only that, but they have to produce all available evidence, if the Court pleases, not what they want to pick out, but all that is available. And they haven't done so.

The Court: Well, it is no mystery to me as to why neither of you have produced Mrs. Thomas. I know why, but it is for the jury to find out, if they are concerned as to why.

Well, I will tell the jury, when they come back, that the defendant was under no obligation to produce Mrs. Thomas. He could have produced her if he wanted to on this point of tenancy, but he was under no obligation to do so, or to produce any evidence.

Mr. Landau: The Government could have produced Mrs. Thomas for rebuttal of inferences, or anything, which they failed to do.

The Court: I have already told them that, that neither side produced Mrs. Thomas.

Mr. Landau: My contention is we are not under the same compulsion of production of witnesses as the Government is, but your Honor perhaps unconsciously has given the jury [281] the impression that we have the same duty of producing Mrs. Thomas as the Government.

The Court: The Government has no duty to produce Mrs. Thomas.

Mr. Landau: Or produce a witness.

The Court: The Government has no duty to produce a witness. All the duty it has is to present its case in any way it sees fit.

Anything else?

Mr. Landau: No, your Honor.

The Court: All right, call the jury back, please. Just a minute.

Mr. Landau: Is the Court going to comment on Case's testimony also, in view of what the Court has said?

The Court: I agree with you, Case did say that. If I call their attention to that, I will also tell them as a matter of law a man can have more than one residence. I think you would rather have me leave it alone, wouldn't you?

Mr. Landau: It is entirely up to the Court.

The Court: I will simply tell them, as they come back, what I think I have already told them, that what I mentioned to them or what I recall or what I call their attention to is not to be regarded par-

ticularly; they are the ultimate judges of all of the evidence. They know what all of the evidence was and they are to base their decision on all [282] of the evidence.

All right, have the jury come back.

(Jury returns.)

The Court: Note the presence of the jury and of the defendant, together with his attorneys.

Gentlemen of the jury, my attention has been called to one or two things that I want to mention to you, in addition to that which I have said previously.

I made some reference in my recent instructions to you about neither the defendant nor the Government producing Mrs. Thomas. I want you to clearly understand that the defendant has no obligation to produce any evidence or any witness, but if he does, that evidence and those witnesses are to be tested in the same manner as you test and weigh the evidence and credibility of any witness.

Similarly, the Government doesn't have to produce any witnesses unless it wants to, but it does have the burden of proof.

There has also been some intimation that perhaps I didn't make as clear to you as I should have, and which I will now try to do, that irrespective of what I have done by way of reviewing the evidence, you gentlemen know full well what all of the evidence is and you are to base your verdict on your assessment and evaluation and measurement of all of the evi-

dence, whether it be given on direct or cross-examination, and to [283] disregard my brief review of it. I may have omitted or emphasized certain things. If so, those omissions or particular emphases are to be disregarded as of no significance or importance, and on all of the evidence by all of the witnesses you are to base your determination, but, as I have told you ninety-nine times, but will tell you now for the last time, you, and you alone, are the sole and exclusive judges of the facts to be drawn from the evidence and from the credibility of the witnesses.

With that, the court will stand at recess once again and, after clearing the court room, turn the court room over to you as your jury room; and after the court room is cleared and delivered to you by the Marshal as a jury room, you may resume your deliberations and the Court will await your decision.

(Thereupon, at 10:20 a.m. the jury retired for further deliberations.)

(At 3:40 court reconvened.)

The Court: Note the presence of the jury and of the defendant, together with his attorneys.

I am in receipt of a note from the jury reading as follows:

“Judge McLaughlin:

“Our jury respectfully requests:

“(1) Transcript of direct examination and

cross-examination [284] of Agent Wells, Officer Case, Officer Sasaki.

“(2) Permission to examine the premises at 803 A and 807 Hausten St.

“/s/ L. F. ANDRE,

“Foreman.

“3:30 p.m.

“January 11, 1949.”

Gentlemen, I will grant your requests in reverse order; due to the time of day I think it is advisable that we go and take the view now during the daylight hours. A bus awaits without, or will be there by the time I get through talking.

The view which we will take is not evidence, but is simply to better enable you to evaluate and understand the evidence which you have heard here in court.

We have ascertained that the premises are available for our inspection. There is no way of knowing whether or not they are in the same condition now as they were at the time testified to in court here, but you can see that for yourselves one way or another.

In your request do you mean to imply that you want to go into the house as well as look around it?

Foreman Andre: Your Honor, it is the jury's wish.

The Court: Yes or no?

Foreman Andre: It is the jury's wish to go into both houses. [285]

The Court: Into both houses. I don't know about 807 Hausten Street, as to whether we can go in there or not. I gathered from the testimony there were some apartments there. The only duplexes, or whatever it is that was testified to, were described without name. I have no way of knowing whether we can obtain permission to go there or not, but we will knock at the door and ask.

Foreman Andre: It is the jury's wish that we go to the same apartment that the officers were in before the raid.

The Court: Is Agent Wells here?

Mr. Hoddick: I can get him, your Honor.

The Court: You see if we can arrange that, so we can do that when we get there. We will do everything we can do. We will ask. If they refuse, that is it.

Foreman Andre: We wish to proceed from 807 to 803 A in that order, if your Honor please.

The Court: We will endeavor to comply with that. I will not allow any questions at the time of viewing. You are just there to look. We will show you what I presume is 807 and we will show you what is 803, and we do have permission to examine 803 A. I have no way of knowing who is in 807.

Then we will come back to court, and since we can't turn out transcripts like a linotype machine, the best we can do is to have the court reporters read to you the transcript of the testimony that you asked for. [286]

So, without further delay, unless there are some

little things I have forgotten to mention—oh, yes, I want everyone, the lawyers, the jury, the defendant, the Court, the Clerk, and one reporter to go with us in the bus; I want everybody to stay together. I don't want any talking about the case during the view, I repeat. It is not evidence; we are simply there to look. We will come directly back to the court.

All right, Mr. Marshal, have you the bus ready?

Marshal Heine: Yes, your Honor.

The Court: All right.

(Thereupon, at 3:45 p.m. an adjournment was taken to view the premises.)

5:05 p.m.

The Court: Note the presence of the jury and of the defendant, together with his attorneys. We have just returned from the taking of a view of 807 Hausten Street and 803 A Hausten Street. As I heretofore told you, gentlemen, that view is not evidence, but simply a view to better enable you to understand and evaluate and weigh the evidence. As I told you before we took the view, we do not know whether those premises are now in the same condition as they were at the time of the testimony. This is January, 1950, and the date in the case is on or about July 16, 1949, so we do not know, I say, whether the premises are now in the same condition they were then or not. [287]

Now, you have asked that certain portions of the evidence be read to you. I believe the first one you

asked for was—well, let's take them in order, the order in which they testified. I think Sasaki was asked for, and he was the first witness, was he not?

Mr. Landau: Yes, your Honor.

The Court: All right, let's read it first. And, Mr. Reporter and Miss Reporter, when you do read, be sure to read good and loud. If you want to stop and take a breath, just do so.

(Examination of Officer Richard Sasaki read by reporter.)

The Court: Do you want to stretch your legs before we take the testimony of another witness?

The Jury: Yes.

The Court: We will take a short recess.

(Recess had.)

The Court: Note the presence of the jury and of the defendant and his attorneys.

(Testimony of Roy F. Case read by reporter.)

The Court: Do you want to go to supper now or do you want to hear Mr. Wells' testimony?

Foreman Andre: Your Honor, the jury respectfully requests that we hear Mr. Wells' testimony.

The Court: Yes.

Foreman Andre: And that we go to dinner, and because [288] of the late hour last night, very late deliberations, that we be excused until 10 o'clock.

The Court: Ten o'clock?

Foreman Andre: Yes.

The Court: Are you going to sleep late in the morning, or do you first go to breakfast at the Young?

Foreman Andre: Yes, sir.

The Court: I think that is reasonable.

Mr. Landau: No objection.

Mr. Hoddick: No objection.

(Testimony of William K. Wells read by the reporter.)

The Court: Very well, gentlemen, I take it you have now had read to you that which you asked for. Is there anything else you want read to you?

Foreman Andre: No, sir, not at this time, sir.

The Court: Very well. Under the same admonitions and instructions that I have heretofore given you as to conduct, the Court at this time will stand adjourned for the day to allow you gentlemen to go to supper and thereafter to retire if you so desire, but, at any rate, not to deliberate further today; and you are to resume your deliberations here in the court jury room at 10 tomorrow morning.

Juryman Mulder: May I have permission to try to get my wife. The 'phone was out of order. I still haven't been able to get her. And in the presence of the Marshal, of [289] course.

The Court: Yes, you may. Any other personal calls?

Mr. Wills: I would like to have permission to call.

The Court: I think after the time that has

elapsed they should be able to do their own calling.

Mr. Landau: I think their wives would probably be glad to hear their voices.

The Court: All right, if you will make the calls short and direct to the point and only about personal matters, the Marshal will allow you to call from his office and under his supervision. The Marshal himself will not be with you but two of his deputies, Mr. Clark and Mr. Bruns. All right, Mr. Bruns.

Mr. Bruns: Yes.

The Court: Until 10 tomorrow.

(Thereupon, at 7:10 p.m., January 11, 1950, an adjournment was taken until 10 o'clock a.m. when the jury was to return for continued deliberation.) [290]

January 12, 1950

The Court: Note the presence of the jury and of the defendant, together with his attorneys.

I have been notified by the Deputy Marshal that the jury has at long last arrived at a verdict; is that correct, Mr. Andre?

Foreman Andre: Yes, your Honor.

The Court: And you are the foreman of the jury, as we know from prior messages received; that is correct, you are the jury's foreman?

Foreman Andre: Yes, sir.

The Court: Will you please give the verdict to the Clerk. The defendant will rise.

Mr. Clerk, you will announce the verdict.

The Clerk: Omitting the heading and title:

“As to Count I of the Indictment, we, the Jury, duly empaneled and sworn in the above-entitled cause, do hereby find the Defendant, Winston Churchill Henry, guilty.

“As to Count II of the Indictment, we, the Jury, duly empaneled and sworn in the above-entitled cause, do hereby find the Defendant, Winston Churchill Henry, guilty.

“Dated: Honolulu, T. H., this 12th day of January, [291] 1950.

“/s/ LEO F. ANDRE,
“Foreman.”

The Court: Such, Mr. Foreman, is the verdict of the jury?

Foreman Andre: Yes, your Honor.

The Court: So say you all, gentlemen of the jury?

The Jury: Yes, your Honor.

The Court: I would like to call you by individual names and have you answer, just so the record will be complete.

Mr. Cook, is that your verdict?

Juryman Cook: Yes, your Honor.

The Court: Just answer “yes” or “no” without standing up.

Juryman Cook: Yes.

The Court: Mr. Mulder?

Juryman Mulder: Yes, your Honor.

The Court: Mr. Mosher?

Juryman Mosher: Yes, your Honor.

The Court: Mr. Kramer?

Juryman Kramer: Yes, your Honor.

The Court: Mr. Webb?

Juryman Webb: Yes, your Honor.

The Court: Mr. Todd?

Juryman Todd: Yes, your Honor. [292]

The Court: Mr. Wills?

Juryman Wills: Yes, your Honor.

The Court: Mr. Kruse?

Juryman Kruse: Yes, your Honor.

The Court: Mr. Andre?

Foreman Andre: Yes, your Honor.

The Court: Mr. Moyers?

Juryman Moyers: Yes, your Honor.

The Court: Mr. Kina?

Juryman Kina: Yes, your Honor.

The Court: Mr. Richardson?

Juryman Richardson: Yes, your Honor.

The Court: Very well, let the verdict be recorded.

Mr. Landau: If your Honor please, we take exception to the verdict as contrary to the law, contrary to the evidence, contrary to the weight of the evidence, and hereby give notice of motion for a new trial.

The Court: The same may be noted upon the record.

At this time the jury is excused until called as part of the regular panel once again to serve. At the moment I have no exact dates in mind, but it

will be not too far distant, but if you are called for future service, I will bear in mind that you have served these many days and will take that into consideration should you have any requests to be considered for being excused. I am not saying that you are going to be [293] excused from further service simply because you have served here, but I will remember that you have served.

Thank you very much for your service. At long last you may go home.

(Jury excused.)

(Discussion as to bond and setting for sentence.)

(Thereupon, at 3:00 p.m., January 12, 1950, court was adjourned.) [294]

January 26, 1950

The Clerk: Criminal No. 10,253, United States of America vs. Winston Churchill Henry. Hearing on motion for a new trial.

The Court: Mr. Landau, you desire to have this matter called up for disposition in chambers?

Mr. Landau: Yes, your Honor.

The Court: And whatever rights you might have to have it conducted in open court you waive?

Mr. Landau: We certainly do.

The Court: And you also waive the right of the defendant to be present?

Mr. Landau: That is correct.

The Court: Indeed, to put it reversely, it is at

your request that we are taking this motion up in chambers.

Mr. Landau: That is correct.

The Court: Do you wish to be heard upon the motion?

Mr. Landau: In view of the fact that this matter has been discussed informally, I just want to make a statement for the record. On the day of the verdict we gave notice of a motion for a new trial. The motion itself was not filed within the five-day period set by the Rules of Criminal Procedure, Section 33. However, Section 37(a)(2) indicates, or at least there is an inference there, that after judgment [295] and within the ten-day period allowed for an appeal a motion for a new trial can be filed, and the time for taking the appeal, that is, the ten-day period for taking the appeal, begins upon the decision of the judge on the motion for a new trial which comes after the judgment of sentence; and I submit, if the Court pleases, that we are entitled to have a hearing on the motion for a new trial even though it was not filed within the five days set by Section 33, since it has been filed, certainly, within the ten-day period, or, rather, before the ten-day period for taking an appeal from the judgment of conviction.

The Court: Starts to run before that.

Mr. Landau: Yes, and I submit, if the Court pleases, that not only that, but Rule 33 says: "The court may grant a new trial to a defendant if required in the interest of justice." Exactly how that

would apply in this particular instance I am a little hesitant to indicate. I believe, however, that that does seem to give the Court considerable leeway, in spite of the five-day rule, apparently as a result of certain decisions being indicative that it is jurisdictional.

The Court: Well, that part of the rule has reference to a situation where the Court, upon its own motion, regardless of whether the rule for a motion for a new trial has or has not been complied with, observes itself something so [296] flagrantly wrong with the case that, rule or no rule, it will in the interest of justice grant a new trial.

Mr. Landau: Without time limit.

Mr. Hoddick: If we are going to go through this point by point, the Supreme Court case that Counsel called to my attention——

Mr. Landau: I didn't call it to your attention. I happened to mention I know there was a case.

Mr. Hoddick: *United States vs. Smith*, 331 U. S. 469. That first sentence does not give the Court authority to grant a motion for a new trial.

The Court: What, then, is the meaning of the phrase, "The Court may in the interest of justice do thus and so"? Where is that phrase?

Mr. Hoddick: "Moreover, it would be a strange rule"——

Mr. Landau: The first line of Section 33.

Mr. Hoddick: "Moreover, it would be a strange rule which deprived a judge of power to do what was asked when request was made by the person

most concerned, and yet allowed him to act without petition. If a condition of the power is that request for its exercise be not made, serious constitutional issues would be raised. For it is such request which obviates any later objection the defendant might make on the ground of double jeopardy.”

The Court: I don't know the exact nature of this [297] Smith case, but I know, rule or no rule, if I were satisfied there was something flagrantly wrong with this trial, I would grant, on my own motion, a motion for a new trial, and we would have a new trial before it ever got to the Supreme Court.

Mr. Hoddick: It is also held in this case that motion must be made within five days. Here it was filed late, and they argued by virtue of this first line the Court could, by its own motion, do it.

Mr. Landau: You have a little different situation. The judge decided to grant a new trial the same day that the Circuit Court of Appeals affirmed the verdict down below, so you have a situation which may have been even more jurisdictional. The appeal having been effected, the court about to render its decision, the court below might be out of its jurisdiction.

The Court: Interesting as that may be, it is not our case, although you allude to that as a possibility.

Mr. Landau: That is right. And of course the only way the court could ascertain whether the court should on its own motion grant a new trial

in the interest of justice would be to determine whether or not those matters which I have submitted in the motion are of sufficient weight and importance to have the court correct any possible error which it may have made down below.

The Court: All right. What is your position?

Mr. Hoddick: With reference to that, first I would argue that the court is without power to grant a new trial on its own motion after the expiration of the five-day period, unless, of course, the defendant should come in with newly discovered evidence, which is not the case here; in which case he could do it on his own motion.

I would also submit that this defendant had a fair trial, that the rulings of the Court were correct, and that the defendant is not entitled to a new trial. There is sufficient evidence to support the verdict.

Mr. Landau: We believe, of course, that we have protected the record and come within the five-day period by a notice of a motion for a new trial filed within the five days, even though it was oral, and that what we have subsequently done is not file a new motion, but merely write out the reasons specifically for the motion for a new trial. We believe, therefore, that we do come within the five-day rule and the motion is properly to be heard before this Court.

Mr. Hoddick: My recollection of what took place, and we would have to check with the reporter to find out, is that you people took exception to

the verdict as being contrary to the evidence and contrary to the law and indicated you would file a notice of appeal. I don't remember you or Mr. Soares' saying anything concerning a motion for a new trial at that time. [299]

The Court: Be that as it may, the record speaks for itself on that score, but I think I can dispose of this motion as the argument now stands.

If you did give notice of intention to file a motion, the rule nevertheless requires that the motion be filed, under Rule 33, within five days after verdict, or obtain an extension of time for good cause, shown within that same five-day period. Obviously, that Rule 33 has not been complied with. As to the possibility of such a motion as this coming to me within the provisions of Rule 37(a) (2), it is my position that that rule has reference to an entirely different factual situation and has primary reference to the calculation of the time within which an appeal is to be governed, and, finally, that if, under such a construction as you, Mr. Landau, place upon the phrase, beginning "but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion," that in any event the general governs are specific and Rule 33 is the cardinal guiding rule, and not any ambiguity in Rule 37(a) (2). Actually, in my opinion Rule 37(a) (2) has reference to where, for example, after verdict, sentence and judgment fol-

lowed, and the ten days began to run, and during the running of that ten-day period you filed, pursuant to Rule 33, within five days a motion for a new trial. [300]

As to the power that the Court might have, regardless of the non-compliance with Rule 33, to grant a new trial upon its own motion in the interest of justice, I think I do have such power. I think this is different from the Smith case, and to that end I have examined the grounds alleged in the motion for a new trial. By and large, most of them are objections and motions which were made during the course of the trial and ruled upon, and to the rulings then and there made I adhere.

The only new matter that attracts my attention is the ground asserted that there was no proof that a crime had been committed except as you made applicable such acts and admissions as by evidence the Government introduced as attributable to the defendant; or, stated differently, your contention here made is that the crime must be established beyond a reasonable doubt by the Government, over and beyond and separate and apart from any admissions on the part of the defendant. As I told you the other day when we discussed this matter informally, that attracted my attention considerably. Upon analysis I think that that rule is not here applicable for the reason that once the Government, in a case such as this, establishes that there were found narcotics which were not aban-

doned and which did not have tax-paid stamps thereupon and were obviously not in or from an original stamped package, it has established that a crime was committed. It must go forward, then, and prove that "X" committed that [301] crime.

Mr. Landau: May I be permitted——

The Court: No, you may not, because that will go 'round and 'round in a circle again.

As to the other contention that—You may not now. When I get through, I will hear you.

As to the other contention which strikes me as new, namely, that when, after the jury had deliberated for some hours, it, late at night, asked the Court to have available for its consideration in the morning a transcript of the Court's instructions, I then told them, as I did on the next morning, that I could not produce a transcript in that short period of time, and even if I could I doubted if I would give that to them, but would handle their request by reviewing the instructions, and did so by instructing them over again, in the course of which I also reviewed some of the evidence for them, that matter to which you refer in your motion I do not think is error, in that I do not think that I committed any error. I think my instructions were proper, my review of the evidence was in order, I had the right to do it in the beginning and, if I had the right to do it then, I had the right also to do it at the time the jury requested further instructions. As to any comments on the evidence that I may have made, I believe the record will

reflect that I adequately told the jury that if I should unintentionally [302] make any comment on the evidence, that they were to disregard it because I was not desirous of invading their province, and that they, and they alone, were the ultimate judges of the facts.

For those reasons, if I could get to the merits of your motion I would deny it, but primarily I do not think under the rules that the Court is able to get to the merits of your motion or to review it again. Under the rules this motion is not reachable, in my opinion, because of non-compliance with Rule 33; but, if, under the phrase in that rule "in the interest of justice, I, on my own motion, could reach it, I would still deny the motion for the reasons indicated.

Now, you wanted to say something and now I will hear you.

Mr. Landau: Yes. I would like to indicate, of course, that the corpus delicti—in this offense it is narcotics as distinguished from marihuana, but the effect would be the same—is the purchase. They don't have any direct evidence of purchase. However, the statute permits them to prove certain things, and if those things have been proven beyond a reasonable doubt, then the crime will be considered as having been proven. In other words, if we prove that they were narcotics, that they were not from stamped packages, and that they were in the possession of the defendant, the jury or the court will be entitled to believe that there has

been a purchase, and that is the corpus delicti. [303]

The Court: That is the whole case.

Mr. Landau: It is one of these cases where it happens to be the whole case. But if all the Government proved was the fact that they were narcotics and they were not from stamped packages, they would not have been able to prove the purchase, even though they prove that they were not abandoned. There must be purchase; there is the offense. In other words, the purchase is somebody selling it to the defendant, the defendant buying it, some consideration paid, and title transferred.

The Court: That is the ultimate thing.

Mr. Landau: That's right. That is the thing. You cannot prove it by only two of those elements; you must prove it by the two elements plus proof of possession.

The Court: It is the same argument over and over again. You throw into that picture possession of the defendant.

Mr. Landau: That's right.

The Court: My position is that a crime under this statute has been shown if the Government produces evidence that in some situation described by the evidence which is short of abandonment or short of being unable to say that somebody had possession; for example, if you found drugs in the middle of the highway, as contradistinguished from finding them, as the evidence here showed, in a house, if you find drugs under those circumstances in a person's house, regardless [304] of whose house it is—

remove entirely the label of whose house it is—but you find them in a dwelling and they are not in an original stamped package and do not bear tax-paid stamps, then the presumption exists, on that fact alone, that a crime has been committed. Then they have got to go forward and show who committed that crime, which, under these circumstances, they must show by showing that that possession was “X’s” possession.

Mr. Landau: Your Honor stated it almost better than I would have dared. You have stated that they had to prove somebody’s possession and, having proved somebody’s possession and all the other elements, they have proved that a crime has been committed. Then they have the additional duty——

The Court: To show who did it.

Mr. Landau: To show who did it.

The Court: Yes.

Mr. Landau: But the possession is a necessary element on the crime, the fact that a crime has been committed.

The Court: Yes.

Mr. Landau: So the possession must be proved by something other than his statements or his acts. In other words, had they had outside evidence that the defendant lived there, that this room was actually his, and that he slept there, then you would have had a different situation. And I submit under Kinney’s testimony, as he gave it down at the [305] district court of Honolulu it would have been more weighty than the testimony he gave here, because

he was down there and testified that in his opinion the defendant lived in that house, because of the fact that he had seen this Packard car three different times in the two weeks prior. He didn't testify to a thing about that in this court, so we don't have any independent testimony that defendant lived there at 803 Hausten Street, but they could have had it had they used it.

The Court: The proposition I advance and adhere to is that, under this particular statute, upon the evidence here, regardless of whose house it was, upon these premises the officers found these drugs, thus indicating, this not being an abandoned house, that somebody had those drugs in possession, then and there they established the corpus delicti, and from there on it was simply necessary for the Government to establish by the necessary degree of proof that "X," or the defendant, was the one who had them then and there in possession.

Mr. Hoddick: Of course, that would be the same answer that I would make to Mr. Landau. I would also like to call attention to one statement that I got from 67 Fed. (2d) 4, Fourth Circuit Court of Appeals:

"The rule does not require that the independent evidence of corpus delicti shall be so full and complete as to establish, unaided, the commission of a crime. It is sufficient that the extrinsic circumstances, taken in connection with the defendant's admission, satisfy the jury of defendant's guilt beyond a reasonable doubt." [306]

Mr. Landau: That is where they have at least some evidence outside of the confession.

The Court: The "some evidence" here is the finding of these drugs on these premises, drugs which did not have tax-paid stamps.

Mr. Landau: That is the point we have been making all the way through. It is not exactly a new point. We have discussed this many many times.

The Court: Yes, but discussed it in such a way that this particular rule of law, to which you call my attention, had not previously come to my direct attention.

Mr. Landau: Not specifically.

The Court: Throughout the trial that has been one of your general contentions, although until you worded it this way, I didn't catch it in this light. So, for the reasons previously outlined, I am denying the motion for a new trial.

Mr. Landau: And, if the Court pleases, may the record also show that the second new point, which your Honor averted, was a point which it was impossible for us to make properly, that is, in any other way, actually, because your Honor had said you didn't want us to make any objections until after you were through with your remarks to the jury. At that time the remarks had been made and any objections would have been futile. [307]

The Court: I can't agree with that. I can agree I told you not to interrupt me while I was talking to the jury, but to make notations as to any objections you wished to make and I would hear you at the end.

Mr. Landau: That is right.

The Court: You did make some objections. You did not make this particular objection; and as to one, at least, of the objections you mentioned, when the jury came back I did make an alteration in what I had said to them about the obligation of the defendant to testify or to produce witnesses.

Mr. Landau: That is right. That was on a question of law rather than direction as to evidence.

The Court: So that, in fairness to me, you must admit that had you thought of it, you could have also claimed then and there that I invaded the province of the jury.

Mr. Landau: Yes, we probably could have called it to your attention more specifically than we did, but again I say even had we done so——

The Court: I would have ruled against you.

Mr. Landau: And had you even ruled in our favor, the damage, if any, would have been done, and you couldn't erase from the jury's mind what your Honor had said.

The Court: Period.

Mr. Landau: May I take an exception to your Honor's ruling? [308]

The Court: Yes. All right, let's go into court now.

(Thereupon, at 2:06 the hearing in the above-entitled matter was adjourned.) [309]

January 26, 1950

The Clerk: Criminal No. 10,253, United States of America vs. Winston Churchill Henry, for sentence.

(Discussion by Court and Counsel.)

The Court: As to Count 1 of this Indictment on which the defendant has been found and adjudged guilty, it is the judgment and sentence of the Court that he stand committed to the custody of the Attorney General for placement by him in an institution of the prison type for a period of four years, and in addition pay a fine of \$1,000.

As to Count 2 of the Indictment, as to which he has also been found guilty and adjudged guilty, it is the judgment and sentence of the Court that he stand committed to the custody of the Attorney General for placement by him in an institution of the prison type for a period of two years and pay a fine of \$1,000, both sentences to run consecutively.

The defendant is committed to your custody, Mr. Marshal, for execution of the sentence.

Mr. Landau: If the Court please, I take exception to the Court's sentence. May we give notice of appeal. May the defendant be released on his bond pending the filing of the notice of appeal.

(Discussion by Court and Counsel.)

(Thereupon, at 3:40 p.m., January 26, 1950, court was adjourned.) [310]

Reporters' Certificate

We, the Official Court Reporters of the U. S. District Court, Honolulu, T. H., do hereby certify as follows:

That the foregoing is a true and correct transcript of proceedings in Criminal No. 10,253, United States of America, Plaintiff, vs. Winston Churchill Henry, Defendant, held in the above-named court on January 4, 5, 6, 9, 10, 11, 12, and 26, 1950, before the Hon. J. Frank McLaughlin, Judge, and a Jury.

/s/ ALBERT GRAIN,

/s/ LUCILLE HALLAM.

Mar. 20, 1950.

[Endorsed]: Filed April 20, 1950 U.S.D.C.

[Endorsed]: Filed May 1, 1950 U.S.C.A.

[Endorsed]: No. 12534. United States Court of Appeals for the Ninth Circuit. Winston Churchill Henry, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed May 1, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12534

WINSTON CHURCHILL HENRY,
Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

DESIGNATION OF RECORD TO BE PRINTED
ON APPEAL

Comes now Winston Churchill Henry, Defendant-Appellant in the above-entitled cause, by Landau & Fairbanks and O. P. Soares, his attorneys, and hereby designates for inclusion in the printed record on appeal the following:

1. Indictment filed September 15, 1949.
2. Motion for Bill of Particulars filed September 27, 1949, together with Affidavit thereon.
3. Motion to Transfer Case from the District of Hawaii and Affidavit filed October 26, 1949.
4. Clerk's Minutes of September 28; October 5, 7; November 1, 9, 10, 1949; January 4, 5, 6, 9, 10, 11 and 12, 1950.
5. Defendant's Requested Instructions 1, 2, 3, 6 and 8 which were refused by the Court and Govern-

ment's Instructions 9 and 10 given by the Court over objection of Defendant.

6. Official Reporter's Transcript of Evidence taken and proceedings had during the argument on the Motion for Bill of Particulars and the Motion to Transfer Case from the District of Hawaii and during the trial, including all statements made by the Court to the jury during the deliberation of the jury.

7. Exhibits introduced by Defendant during hearing on Motion to Transfer Case from the District of Hawaii.

8. Motion for New Trial filed January 23, 1950.

9. Clerk's Minutes of January 26, 1950.

10. Official Reporter's Transcript of Testimony taken on January 26, 1950, during argument on the Motion for New Trial and the actual Sentence of the Court and exception thereto.

11. Judgment of Sentence of the Court.

12. Notice of Appeal filed February 3, 1950.

13. Election of Defendant filed February 3, 1950.

14. Bond filed February 3, 1950.

15. Cost Bond filed February 3, 1950.

16. Amended Designation of Record on Appeal filed April 14, 1950.

17. This Designation of Record to be Printed on Appeal.

18. Defendant's Statement of Points to be Relied
Upon on Appeal.

Dated: Honolulu, T. H., this 14th day of April,
1950.

WINSTON CHURCHILL

HENRY,

Defendant-Appellant.

By LANDAU & FAIRBANKS and

O. P. SOARES,

His Attorneys.

By /s/ SAMUEL LANDAU.

Service admitted.

[Endorsed]: Filed May 1, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE PRINTED
ON APPEAL

Comes now the United States of America, Plaintiff-Appellee in the above-entitled cause, by Ray J. O'Brien, United States Attorney for the District of Hawaii, and hereby designates for inclusion in the printed record on appeal the following:

1. All instructions given by the Court.
2. Affidavit and search warrant.
3. Designation of Record on Appeal filed April 25, 1950.
4. Amended Designation of Record on Appeal filed April 25, 1950.
5. This Designation of Record to be Printed on Appeal.

Dated: Honolulu, T. H., this 25th day of April, 1950.

UNITED STATES OF
AMERICA,
Plaintiff-Appellee.

By /s/ RAY J. O'BRIEN,
United States Attorney,
District of Hawaii.

Service admitted.

[Endorsed]: Filed May 1, 1950.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY DEFENDANT-APPELLANT ON
APPEAL

Comes now Winston Churchill Henry, Defendant-Appellant in the above-entitled cause, by Landau & Fairbanks and O. P. Soares, his attorneys, and in conformance with Rule 9 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit hereby states that it is intended that the Defendant-Appellant shall rely upon the following points:

1. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's Motion for Bill of Particulars.

2. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's Motion to Transfer the Case from the District of Hawaii.

3. That the United States District Court for the District of Hawaii erred in permitting a material witness for the United States to remain within the courtroom during the trial of the cause after the witnesses had been placed under the rule of exclusion.

4. That the United States District Court for the District of Hawaii erred in admitting in evidence United States Exhibit F (No. 7 for identification).

5. That the United States District Court for the District of Hawaii erred in denying Defendant-Appellant's motion for a mistrial as a result of the publication during the course of the trial of an article in a local newspaper.

6. That the United States District Court for the District of Hawaii erred in denying Defendant-Appellant's motion to strike the testimony of Government witnesses, to wit, police officers of the Honolulu Police Department, acting under the direction of agents and employees of the United States, and agents and employees of the United States, relating to acts of and conversations with the Defendant-Appellant for the reason that at the time of those acts and conversations the Defendant-Appellant was under illegal arrest.

7. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's motion to strike the testimony of Officer Kinney relating to a conversation between the witness and Defendant-Appellant concerning an investigation being conducted by Police Officer Kinney.

8. That the United States District Court for the District of Hawaii erred in denying the Defendant-Appellant's motion to strike the testimony of H. A. Patterson concerning the making of a demand for the production of forms on September 27, 1949, and giving Defendant-Appellant until September 30, 1949, to produce those forms.

9. That the United States District Court for the District of Hawaii erred in denying Defendant-Appellant's motion for a Judgment of Acquittal as to both counts generally and as to Counts I and II specifically.

10. That the United States District Court for the District of Hawaii erred in its instructions to the jury in that it imposed on Defendant-Appellant a duty of explaining possession at a time when possession of the articles alleged in the indictment had been denied.

11. That the United States District Court for the District of Hawaii erred in its instructions to the jury in stating that the fact that the drug in Count II was marijuana had been proven, in effect taking away from the jury the question for them to decide whether the articles were or were not marijuana.

12. That the United States District Court for the District of Hawaii erred in its instructions to the jury in stating that no satisfactory explanation had been made by the defense of the possession of the articles alleged in the indictment, thus indicating to the jury that the Defendant-Appellant did in fact have possession, taking that question away from the jury.

13. That the United States District Court for the District of Hawaii erred in instructing the jury that if they could not arrive at a unanimous verdict of guilty the Defendant-Appellant would have to

be acquitted, thus removing from the jury the possibility of a "hung" jury.

14. That the United States District Court for the District of Hawaii erred in refusing to give Defendant-Appellant's Requested Instruction No. 2.

15. That the United States District Court for the District of Hawaii erred in refusing to give Defendant-Appellant's Requested Instruction No. 1.

16. That the United States District Court for the District of Hawaii erred in refusing to give Defendant-Appellant's Requested Instruction No. 3.

17. That the United States District Court for the District of Hawaii erred in refusing to give Defendant-Appellant's Requested Instruction No. 6.

18. That the United States District Court for the District of Hawaii erred in refusing to give Defendant-Appellant's Requested Instruction No. 8.

19. That the United States District Court for the District of Hawaii erred in giving United States' Requested Instruction No. 9.

20. That the United States District Court for the District of Hawaii erred in giving United States' Requested Instruction No. 10.

21. That the United States District Court for the District of Hawaii erred in giving to the jury additional instructions on the question of possession after the jury had retired to deliberate, the said instructions then given being misleading and not proper statements of the law.

22. That the United States District Court for the District of Hawaii erred in answering the jury's request for a transcript of the Court's instructions after the jury had retired for its deliberation by giving the jury instructions, some of which were misleading and not proper statements of the law, by discussing and commenting on the evidence, which in effect was an argument to the jury, while the jury was in deliberation and after the Court had said it would not comment on the evidence.

23. That the verdict of the jury was contrary to the law, contrary to the evidence and contrary to the weight of the evidence.

24. That the United States District Court for the District of Hawaii erred in denying the Motion of Defendant-Appellant for a New Trial.

25. By reason of said errors and other manifest errors appearing in the record designated herein, the judgment of conviction should be set aside.

Dated: Honolulu, T. H., this 20th day of April, 1950.

WINSTON CHURCHILL

HENRY,

Defendant-Appellant.

By LANDAU & FAIRBANKS and

O. P. SOARES,

His Attorneys.

By /s/ SAMUEL LANDAU.

No. 12,534

IN THE

United States Court of Appeals
For the Ninth Circuit

WINSTON CHURCHILL HENRY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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No. 12,534

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WINSTON CHURCHILL HENRY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

By indictment filed in the United States District Court for the District of Hawaii appellant was charged with violating 26 U.S.C., Internal Revenue Code, sections 2553 (a) and 2593 (a), within the jurisdiction of that court. T 2-3. The district court had jurisdiction. 18 U.S.C., section 3231; Rule 18, Federal Rules of Criminal Procedure. On conviction thereof appellant was sentenced to imprisonment and fined by final judgment made and entered January 26, 1950. T 32-34. Notice of appeal therefrom was filed February 3, 1950. T 52-53. The appeal was timely. Rule 37 (a), Federal Rules of Criminal Procedure. Jurisdiction of this court to review the final

judgment of the district court is sustained by 28 U.S.C., Judiciary and Judicial Procedure, sections 1291, 1294.

STATEMENT OF THE CASE.

The indictment, filed September 15, 1949, contained two counts. T 2-4. The first count charged that on July 16, 1939, in the City and County of Honolulu, Territory of Hawaii, appellant violated 26 U.S.C., section 2553 (a), in that he "did knowingly, wilfully, unlawfully and feloniously purchase a salt, compound and derivative of opium, to wit, 946 capsules, each containing heroin, and a derivative of coca leaves, to wit, 250 grains of cocaine, which heroin and cocaine was not then and there in the original stamped package and was not from the original stamped package". T 2. Said section 2553 (a) provides:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found. . . ."

That heroin and cocaine are drugs mentioned in 26 U.S.C., section 2550 (a), is not open to doubt.

The second count in the indictment charged that on July 16, 1949, in the City and County of Honolulu, Territory of Hawaii, appellant violated 26

U.S.C., section 2593 (a), in that he "being then and there a transferee required to pay the transfer tax imposed by Section 2590 (a), Title 26, United States Code, did knowingly, wilfully, unlawfully and feloniously acquire and otherwise obtain a quantity of marihuana, to wit, 787 grains of marihuana and 35 marihuana cigarettes without having paid such tax".

T 3.

Said section 2593 (a) provides:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section. . . ."

A jury found appellant guilty as to both counts on January 12, 1950. T 27. By judgment and commitment made and entered January 26, 1950, he was sentenced to imprisonment for 4 years and to pay a fine of \$1000 on the first count and to imprisonment for 2 years and to pay a fine of \$1000 on the second count, the sentences to imprisonment to run concurrently.

Appellant's arrest was preceded by a search warrant issued on July 12, 1949, to William K. Wells, a federal narcotic agent, authorizing him to search "a two story stucco building located at 803 Hausten

Street, Honolulu, T.H., said two story stucco building is painted white with green awning and is the second building in the rear of 803 Husten Street''. T 65-67. *According to the official Rent Control records of Honolulu, this building was owned by Edna D. Olson and the tenant thereof was Helen Thomas.* T 431-435. There was no driveway from Husten Street to the rear building. T 259. A tile wall 4 or 5 feet high enclosed both buildings. T 259.

And the search, made July 16, 1949, was preceded by elaborate plans and preparations on the part of narcotic agent Wells with the Honolulu police department cooperating. To locate the whereabouts of appellant a police officer was detailed on the morning of July 16 to watch the restaurant conducted by appellant on Smith Street. T 320, 338, 346-347. Appellant was not there. T 348. *Another police officer was detailed to watch appellant's residence at 408 Kea-nianu Street.* T 295-296. Appellant was not there. From 8:30 a.m. to 12:38 p.m. of July 16 narcotic agent Wells and 4 police officers stationed themselves in a building at 807-B Husten Street from which they could observe activities at 803 Husten Street. T 258, 273, 370. Between those hours they saw two children, a sister and a daughter of Helen Thomas, going in and out of the rear building at 803 Husten Street, riding around on a bicycle, and on one occasion one of the children returned to the building with a package wrapped in paper. T 260, 355, 371; they saw one Charles Montgomery drive up in a Packard automobile, park the car in front of 803 Husten

Street, and then enter the building in the rear. T 259-260; and at 12:38 p.m. they left the building at 807-B Hausten Street and went to the street below when they saw appellant walk out from the side of 803 Hausten Street and approach the automobile which Montgomery had parked. T 261, 330.

Narcotic agent Wells informed appellant of the search warrant, appellant said "OK", and the raiding or searching party, together with appellant, entered the living room of the house after the little daughter of Helen Thomas had unlatched the lock of a screen door. T 370-371. The members of the searching party did not agree as to where those inside the house were located at the time. According to narcotic agent Wells, Helen Thomas, her sister, and Montgomery were upstairs at the time. T 371. But according to one of the police officers, only Helen Thomas was upstairs at the time. T 275-277. In any event, Helen Thomas was brought down stairs before the search began and she and the two children remained seated on a couch in the living room during the greater part of the search. T 262-263, 274-276, 356, 371. Six additional police officers joined the raiding party during the progress of the search which began shortly after 12:38 p.m. and ended approximately at 3 p.m. T 263, 269-270, 294, 319-320, 377.

In chronological order, the search disclosed the following: (a) At 12:55 p.m., a police officer discovered a bottle containing 915 capsules filled with white powder under one of 3 concrete flagstones in a path-

way back of the rear house. T 263-264, 267, 270. A government chemist who analyzed a "certain quantity" from some of 10 capsules taken at random from this bottle said the quantity thus analyzed was heroin, a derivative of opium. T 393-394, 425; (b) shortly after 1:08 p.m., a police officer discovered a small bottle containing a substance having the appearance of Epsom salts under a pillow on a sun couch in a patio about 15 feet from where the first bottle was found. T 298-299, 309-310, 313. A government chemist who analyzed a "certain quantity" taken from this bottle said the quantity thus analyzed was cocaine, a derivative of coca leaves. T 394-395, 425; (c) a few minutes later, a police officer discovered a box containing 29 cigarettes and a brown paper bag containing a substance having the appearance of tea, jammed between a window screen and a shade on the outside of the building in the rear of the house. T 321-323. A government chemist who analyzed 3 of the 29 cigarettes said the 3 cigarettes thus analyzed contained marihuana. T 402-403. And the same government chemist, who analyzed 29.6 grains taken from the paper bag said the substance thus analyzed was marihuana. T 395; (d) and finally, a police officer who searched a couch or sofa in the living room after Helen Thomas, who was seated thereon, had been ordered off, discovered 6 cigarettes rolled up in paper under one of the cushions. T 327, 334-335, 339-341, 355-357. A government chemist who analyzed 3 of the cigarettes said the 3 cigarettes thus analyzed contained marihuana. T 398-399.

None of the articles discovered by the search bore narcotic tax paid stamps. T 403. After the indictment was returned (September 15, 1949) the collector made demand (September 27, 1949) upon appellant for production of the order forms required by 26 U.S.C., sec. 2591, respecting marihuana. T 2-4, 408-409. The forms were not produced. T 409.

As stated, the search began shortly after 12:38 p.m. and ended around 3 p.m. T 263, 269-270, 294, 319-320, 377. Appellant was not placed under arrest until 30 or 40 minutes after the search began, and the arrest occurred while rooms upstairs in the house were being searched and after both bottles earlier mentioned had been discovered. T 371, 384-385. Both before and after the arrest appellant was under restraint and was required to accompany narcotic agent Wells wherever the latter went on the premises. T384-385. Both before and after the arrest appellant was subjected to interrogation, and testimony respecting what he said and did was given at the trial as follows: (a) Before the arrest, when narcotic agent Wells placed on his tongue some of the contents from the small bottle, appellant said to Wells, "Man, don't do that, Billy; that's dynamite", and that appellant also said the bottle contained "more than" 200 grains. T 300-301, 328, 378; (b) after the arrest, and while the kitchen was being searched, appellant told Helen Thomas to go upstairs and get a key to a locked closet. T 376; (c) after the arrest, and while the kitchen was being searched, Wells asked appellant how long he had lived there,

and appellant said, "Oh, not very long". T 376; (d) in the kitchen, after the arrest, appellant referred to Helen Thomas and said to Wells, "Billy, you don't have to take her down; she doesn't know anything about this stuff", and when Wells said to appellant, "Well, then, is it your stuff?", appellant "just smiled and didn't reply". T 383; (e) at the police station after the arrest, and around 4:45 p.m. while police officer Kinney was interrogating appellant respecting two guns found during the search, appellant said, "I am responsible for everything that was found on the premises" and that appellant also said he had lived at 803 Hausten Street about two months prior to the arrest. T 413.

During the course of the trial appellant moved to strike all the testimony of Government witnesses relating to incriminatory acts and statement of appellant after the service of the search warrant. T 426. The motion was denied. T 431. A specification of error is addressed to this ruling. Appellant also moved to strike the testimony of officer Kinney relating to his conversation with appellant at the police station around 4:45 p.m. T 426-427. The motion was denied. T 431. A specification of error is addressed to the ruling. And appellant moved to strike the testimony of the collector concerning his demand on September 27, 1949, for production of the order forms required by 26 U.S.C., sec. 5591. T 427-428. The motion was denied. T 431. A specification of error is addressed to the ruling. A motion for judgment of acquittal as to

both counts of the indictment was made on the ground of insufficiency of evidence. T 428-430. The motion was denied. T 431. A specification of error is addressed to the ruling on each count. Another specification of error has reference to a new and superseding jury charge given by the court after jury deliberations had commenced.

SPECIFICATION OF ERRORS RELIED UPON.

1. The district court erred in denying appellant's motion for judgment of acquittal as to the first count of the indictment.

2. The district court erred in denying appellant's motion for judgment of acquittal as to the second count of the indictment.

3. The district court erred in denying appellant's motion to strike the testimony of deputy collector Patterson respecting demand made upon appellant on September 27, 1949, to produce order forms required by 26 U.S.C., sec. 2591, which motion was made on the ground that demand was not made until after the indictment had been returned against appellant.

4. The district court erred in denying appellant's motion to strike the testimony of government witnesses relating to incriminatory acts of, and conversations with, the appellant after service of the search warrant, which motion was based on the ground that

appellant was under illegal restraint after such service and not acting freely and voluntarily.

5. The district court erred in denying appellant's motion to strike the testimony of officer Kinney as to a conversation with appellant at the police station regarding guns, which motion was made on the ground that the conversation was irrelevant and immaterial.

6. The district court erred to the prejudice of appellant, and appellant was denied a fair trial, by the court denying the request of the jury during its deliberations for a transcript of the instructions given, and by giving in lieu thereof a new and superseding jury charge wherein the bounds of proper comment by the court were exceeded.

ARGUMENT OF THE CASE.

SPECIFICATION OF ERROR NO. 1.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE FIRST COUNT OF THE INDICTMENT.

At the close of the Government's case, appellant moved for judgment of acquittal (directed verdict) as to the first count of the indictment on the following grounds (T 428-429):

“We move for a directed verdict now, if the Court pleases, as to both counts, for the reason that there is absolutely no direct evidence as to the violation of the defendant, that the only evidence which the Government has tried to produce, as was admitted by the Government during

the argument on the motion for a bill of particulars, was the presumptions arising from possession, and the Government has failed to show that on July 16, 1949, the defendant was found in possession of any of the articles mentioned in either count of the indictment, for the reason that possession, to be incriminatory, must be personal and exclusive, neither of which has been shown by the Government.

We make a specific motion for a directed verdict as to Count 1, if the Court pleases, in addition to reasons given on the motion for a directed verdict as to both counts; we move for a directed verdict as to Count 1 for the reason that there is a variance between the indictment and the proof, for the reason that there is no evidence that defendant was found in possession of any of the articles mentioned in said count, nor that the said articles did not come from an original stamped package, for the reason that the evidence is silent as to any purchase by the defendant of these articles as is charged in the indictment, and is silent as to any dealings therein; that the so-called presumption of the statute is not a presumption by (but) a rule of evidence shifting the burden of going forward. It is not evidence of an act which the jury must find beyond all reasonable doubt, to wit, that the defendant did, in fact, purchase these articles on or about July 16, 1949. And for the further reason that the evidence, giving the Government every possible and conceivable benefit, at best raises two theories, one consistent with innocence, the other with guilt, and under the law the

theory consistent with innocence must be accepted by the Court.”

The court denied the motion. T 431. It should have been granted. The first count of the indictment was based on 26 U.S.C., sec. 2553 (a), earlier quoted, and it charged appellant with the unlawful *purchase* of heroin and cocaine which was neither in nor from the original stamped package. No witness testified at the trial that appellant ever purchased heroin or cocaine from anyone. Said section 2553 (a) provides, however, that “the absence of appropriate tax paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of violation of this subsection *by the person in whose possession same may be found*”. (Emphasis added.)

On the record before the court there was enough evidence to support a finding that at least some quantity of heroin and cocaine was found on the premises at 803 Hausten Street. There was also enough evidence to support a finding of the absence of appropriate tax paid stamps from the drugs thus found. The vital question here, obviously, is whether such drugs were found in the possession of the appellant. If there was not enough evidence in the record to support a finding that the drugs were in the possession of the appellant, it must therefore follow inevitably that the evidence was insufficient to support a conviction on the first count and the court erred in denying the motion for judgment of acquittal as to that count.

In the record before the court there is evidence, adduced by the government, that appellant's residence was at 408 Keanianu Street, Honolulu. T 295-296. And there is evidence, adduced by appellant, that 803 Hausten Street was rented to Helen Thomas and not to appellant. T 431-435. It is clear from the record that Helen Thomas, her little daughter, and her little sister were living at 803 Hausten Street and were on the premises at the time of the search. Fairly considered, the foregoing state of the record therefore impels a conclusion that any drugs found on the premises at 803 Hausten Street were in the possession of Helen Thomas and not appellant, and that the statutory inference permitted by said section 2553 (a) has application to Helen Thomas and not to appellant.

But from the statement of the case herein it will be obvious to the court that the government sought to bring appellant within the scope of the statutory inference by testimony of confessions or admissions made by him before and after arrest. In other subdivisions of this brief appellant challenges the rulings of the court denying his motions to strike such testimony. At this place appellant points out that such confessions or admissions stand uncorroborated in the record and that under settled law they were therefore inadequate to support or sustain a conviction on the first count of the indictment. *Warszower v. United States*, 312 U.S. 342, 345-348, 61 S.Ct. 603, 605-607, 85 L.Ed. 876; *Ercoli v. United States*,

C.A.D.C., 131 F. 2d 354, 356-357; *Forte v. United States*, C.A.D.C., 94 F. 2d 236, 243-244.

Accordingly, the court erred in denying appellant's motion for judgment of acquittal as to the first count. It is true that in moving for judgment of acquittal counsel for appellant used the term "directed verdict" instead of "judgment of acquittal". But that was an irregularity which must be disregarded. Rule 52 (a), Federal Rules of Criminal Procedure. It is also true that the motion was made at the close of the evidence offered by the government, T 426-431, and was not repeated or renewed *in terms* at the close of all the evidence. T 437. But it was repeated or renewed *in substance* by the following instruction requested at the close of all the evidence and which the court denied (T 50):

"Instruction No. 1

I instruct you, Gentlemen of the Jury, that you find the defendant, Winston Churchill Henry, not guilty as to Count I.

Denied.

/s/ J. F. Mc."

SPECIFICATION OF ERROR NO. 2.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S
MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE SEC-
OND COUNT OF THE INDICTMENT.

At the close of the Government's case, appellant moved for judgment of acquittal (directed verdict) as to the second count of the indictment on the following grounds (T 429-430):

“We move for a directed verdict as to Count 2, if the Court pleases, in addition to the grounds given as to the motion for a directed verdict as to both counts; we move for a directed verdict as to Count 2 for the reason that there is no direct evidence that the defendant was a transferee or required to pay the tax, nor is there any evidence that the defendant was found in possession of any of the articles mentioned therein, that there is no proper evidence as to the demand by the Collector to produce the order forms; and, of course, if my motion to strike Mr. Patterson’s testimony is granted, there is no evidence at all of the demand and therefore no presumption whatsoever; that the presumption, if any, is not evidence of a fact, which the jury must find beyond all reasonable doubt, to wit, that the defendant was in fact a transferee and required to pay the tax. Giving the Government’s evidence every possible benefit, the evidence at best raises two theories, one consistent with innocence, the other with guilt, and under the law the theory consistent with innocence must be accepted by the Court.”

The court denied the motion. T 431. It should have been granted. The second count of the indictment was based on 26 U.S.C., sec. 2593 (a), earlier quoted, and it charged appellant with unlawfully acquiring or obtaining marihuana without having paid the required transfer tax. T 3. No witness testified at the trial that appellant ever acquired or obtained any marihuana. Said section 2593 (a) provides, however, that “proof that any person shall have had in his

possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of such guilt under this section”.

What was said under Specification of Error No. 1 respecting insufficiency of evidence and form of motion is equally applicable to Specification of Error No. 2 and need not be repeated. The instruction which the court denied at the close of all the evidence was as follows (T 50):

“Instruction No. 2

I instruct you, Gentlemen of the Jury, that you find the defendant, Winston Churchill Henry, not guilty as to Count II.

Denied.

/s/ J. F. Mc.”

Here, as there, the conclusion is impelled that the court erred in denying the motion for judgment of acquittal.

The ruling of the court denying appellant's motion to strike the Patterson testimony mentioned by appellant's counsel in presenting the motion for judgment of acquittal as to the second count is the subject of Specification of Error No. 3. The Patterson testimony had reference to demand by the Collector upon appellant to produce the order forms required by 26 U.S.C., sec. 2591.

SPECIFICATION OF ERROR NO. 3.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF DEPUTY COLLECTOR PATTERSON RESPECTING DEMAND MADE UPON APPELLANT ON SEPTEMBER 27, 1949, TO PRODUCE ORDER FORMS REQUIRED BY 26 U.S.C., SEC. 2591, WHICH MOTION WAS MADE ON THE GROUND THAT DEMAND WAS NOT MADE UNTIL AFTER THE INDICTMENT HAD BEEN RETURNED AGAINST APPELLANT.

At the close of the testimony offered by the Government the following motion was made by appellant (T 427-428):

“We move to strike the testimony of Mr. H. A. Patterson, if the Court pleases, in which he testified concerning the making of a demand of the defendant for the production of certain forms on September 27, 1949, and giving him until September 30 to produce those forms, for the reason that the demand was made after the indictment was returned by the grand jury; and, even though Mr. Patterson may himself not have known that an indictment had previously been brought, the demand was made in the presence and at the request of Mr. Wells, who knew that the indictment had, in fact, been returned; for the further reason that at the trial of the case the only evidence of nonpayment of the tax was Mr. Patterson's testimony, which was not and could not have been available to the grand jury, and hence at the time of the indictment there was, in fact, no evidence of any violation of the law; for the further reason that the time given by the witness to the defendant to produce the forms was not reasonable under the circumstances; and for the further reason that the demand having

come after the indictment was in effect required the defendant to give testimony against himself; and for the further reason that there is no evidence that Mr. Patterson in any way informed the defendant as to the law and the requirement that such forms be produced or the effect of such failure."

The Patterson testimony to which the motion to strike was addressed appears in the record as follows (T 408-410):

"Q. Mr. Patterson, you are familiar with the marihuana order forms which are mentioned in Section 2593 Title 26, U.S.Code?

A. Yes, sir, I am.

Q. Did you at any time make demand on the Defendant for production of such order forms covering the marihuana which was picked up at 803 Husten Street on July 16, 1949?

A. Yes, sir, I did.

Q. And where did you make such demand?

A. On the date of September 27th at 8:20 p.m.

Q. Where did you make such?

A. In the premises of Helen's Sweets Shop.

Q. And did he produce those order forms at that time?

A. No, sir, he did not.

Q. Did you give him a time within which he should produce them?

A. I gave him until the close of business September 30th to produce it in the field office to me.

Q. And did he produce them?

A. No, sir, he did not. * * *

The Court. * * * What was the date on which you made the demand on him?

The Witness. September 27th, sir.

The Court. 1949?

The Witness. Yes.

The Court. You gave him until the close of business of what?

A. September 30th.

Mr. Hoddick. And this all took place in 1949?

The Witness. Yes. * * *

By Mr. Landau. Q. Do you know, Mr. Patterson, whether or not at the time you made the demand on September 27th that the defendant had already been indicted for this offense?

A. No, sir, I did not.

Q. Do you now know that at the time you made the demand he had already been indicted?

A. Yes, sir.

Q. Who was with you at the time that you made the demand, Mr. Patterson?

A. The demand was made in the presence of Mr. Wells.

Q. And at the request of Mr. Wells?

A. At the request of Mr. Wells."

The court denied the motion to strike this testimony. T 431. It should have been granted. Appellant was arrested July 16, 1949. T 371, 384-385. He was indicted September 15, 1949. T 2-4. The collector's demand was made September 27, 1949. Between arrest and indictment there was ample time to make the demand. Under such circumstances appellant respectfully submits that demand made after indictment was unreasonable as a matter of law and inadequate

to evoke the statutory inference permitted by 26 U.S.C., sec. 2593 (a).

That prejudice resulted from the denial of the motion to strike is obvious, for in the absence of reasonable demand foundation for the statutory inference did not exist.

SPECIFICATION OF ERROR NO. 4.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF GOVERNMENT WITNESSES RELATING TO INCRIMINATORY ACTS OF, AND CONVERSATIONS WITH, THE APPELLANT AFTER SERVICE OF THE SEARCH WARRANT, WHICH MOTION WAS BASED ON THE GROUND THAT APPELLANT WAS UNDER ILLEGAL RESTRAINT AFTER SUCH SERVICE AND NOT ACTING FREELY AND VOLUNTARILY.

At the close of the testimony offered by the Government, the following motion was made (T 426):

“The defense now moves, if the Court please, to strike all the testimony of Government witnesses relating to acts of, and conversations with, the defendant that are in any way incriminatory which occurred after the service of the search warrant at 803 Hausten Street, for the reason that at the time of the search and investigation thereafter the defendant was then under illegal arrest, and hence anything that was said by him or done by him is presumed to have been done or said under duress and not free and voluntary.”

The Court denied the motion. T 431. The testimony to which the motion was directed appears in the record as follows:

Narcotic agent Wells (T 378, 383, 375-376):

“Q. Did you receive anything from Officer Case?

A. I received a bottle from Officer Case. I took the cork out.

Q. Where did you receive it?

A. In the kitchen, in the house in the rear of 803 Hausten Street. And I put a little of the contents on my tongue. The Defendant said, ‘Man, don’t do that, Billy; that’s dynamite.’

Q. What did you do with the bottle after that?

A. And I said, ‘This bottle must contain about 200 grains.’ The Defendant said, ‘No, more than that.’ ” * * *

“Q. Did you take Mrs. Thomas down to the police station with you?

A. Yes, sir.

Q. Did the Defendant say anything concerning that?

A. Oh, while in the kitchen he told me in the kitchen, he said, ‘Billy, you don’t have to take her down; she doesn’t know anything about this stuff.’ I said, ‘Well, then, is it your stuff?’ He just smiled and didn’t reply.” * * *

“Q. And then?

A. Then I went back to the kitchen, proceeded to search the kitchen, and then I asked the Defendant if he had the key to the door of a closet which led underneath the stairway.

Q. And what did the Defendant say?

A. Well, he said you can’t—he didn’t have it. So I told him that I have to search that closet, I had a search warrant. He then told Mrs. Thomas to go upstairs and get the key, which she did, and

came back and handed it to me, and I opened the door, went in and proceeded to search the closet.

Q. Did you find anything in the closet?

A. I found a loose panel in the closet?

Q. Did you speak to the defendant about this loose panel?

A. Yes, sir, I said to the Defendant, 'Shorty, this is a good plant, but it's empty.' He said it was there before he moved in.

Q. Did that mark the completion of your search of the premises?

A. Yes, sir.

Q. What did you do then?

A. Then I came to the kitchen to wash my hands. I had a conversation with the Defendant. I said to the Defendant, 'Shorty, you have a nice place here. How long have you been living here?' He said, 'Oh, not very long.' " * * *

Officer Case (T 300-301):

"Q. * * * Did Mr. Wells ever give the bottle back to you after you handed it to him in the dining room?

A. Oh, yes, sir, immediately after. He looked at the bottle and asked Mr. Henry what he estimated that to be. He said about—Mr. Wells said, 'This is about 200 grains, don't you think so, Henry?'

Q. What did Mr. Henry say?

A. 'More than that.' So Mr. Wells pulled the bottle stopper out and dipped his finger into the contents of it and rubbed it on his tongue.

Q. Was Mr. Henry there at that time?

A. Yes, sir.

Q. Did he say anything?

A. Yes, sir.

Q. What did he say?

A. He said, 'Man, that is dynamite. Billy, you know better than that.' "

Officer Ferry (T 328):

"Q. Now, during the time that you were at 803 Hausten Street, Mr. Ferry, did you hear the defendant say anything?

A. Yes, when I went back in to bring the two contents over to Lieutenant Fraga, Mr. Wells was at that time testing the white powdered substance in the bottle that was discovered by Mr. Case, and if I remember correctly, the defendant, when Mr. Wells tasted some of it and rubbed it on his tongue, Mr. Henry said something, 'You know better than that. That's dynamite,' or something, words to that effect.

Q. Did you hear him say anything else during the course of the search?

A. Mr. Wells said, 'There is about 200 grains of something in there,' and Mr. Henry said, 'More than that,' or something like that."

As disclosed by the statement of the case herein *eleven officers* including narcotic agent Wells participated in the raid or search, and both before and after an arrest without warrant appellant was under restraint and was required to accompany Wells wherever the latter went on the premises. Logic will not permit it to be said that acts done or statements made by appellant under such circumstances were free or voluntary. *United States v. Baldocci*, D.C.Cal.,

42 F. 2d 567, 568. That the ruling of the court denying the motion to strike, was prejudicial error, may not be doubted under the decision of the Supreme Court in *Upshaw v. United States*, 335 U.S. 410, 411-414, 69 S.Ct. 170-172.

SPECIFICATION OF ERROR NO. 5.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF OFFICER KINNEY AS TO A CONVERSATION WITH APPELLANT AT THE POLICE STATION REGARDING GUNS, WHICH MOTION WAS MADE ON THE GROUND THAT THE CONVERSATION WAS IRRELEVANT AND IMMATERIAL.

At the close of the testimony offered by the Government, the following motion was made (T 426-427):

“Move to strike the testimony of Officer Kinney, if the Court pleases, especially that portion of his testimony in which he testified about a conversation between himself and the defendant at the vice squad room, on July 16, 1949, at or about 4:45 p.m., wherein the defendant is alleged to have stated that he was responsible for everything at 803 Hausten Street, for the reason that, as Mr. Kinney testified, he was then conducting an investigation concerning certain guns, and the questions put to the defendant and the defendant's answers thereto related specifically to those guns and hence could have no possible bearing on, or admissible as an admission in this case, or to any matter which was not then under investigation by Mr. Kinney.”

The court denied the motion. T 421. It should have been granted. The testimony to which the motion was addressed appears in the record as follows (T 412-413, 419-420) :

“Q. And where did you have this conversation with the Defendant?

A. At the vice room in the Honolulu Police Department.

Q. And approximately what time?

A. Approximately 4:45 in the afternoon.

Q. That was on July 16, 1949?

A. Yes, sir.

Q. And at that time did the Defendant say anything to you concerning the various articles which were found at 803 Hausten Street?

A. Yes.

Q. What did he say?

A. He said that everything that happened out at the premises at 803 Hausten Street ‘I am responsible for.’ And everything that was found on the premises. * * *

A. ‘Everything that was found on the premises at 803 Hausten Street I am responsible for.’ * * *

Q. Will you relate to the Court and Jury, Mr. Kinney, what else you heard the Defendant say down at the police station on July 16, 1949?

A. The Defendant stated, said that he was living at 803 Hausten Street. * * *

Q. Did he say how long he had been living there?

A. About two months prior to the arrest.” * * *

“Q. Now, as a matter of fact, Mr. Kinney, this conversation that you had down there with

Mr. Henry was in the course of your investigation concerning the possession of a gun?

A. Two guns.

Q. * * * But that is what your investigation concerned itself with, isn't that right?

A. Yes, sir.

Q. And you knew that when Mr. Henry was answering your questions he was answering the questions with reference to the subject matter of your investigation.

A. Well, he was answering questions in general. The questions I was putting across to him was in general. I mean the whole thing that happened out at Hausten Street.

Q. With reference to the items which you were investigating, isn't that correct, Mr. Kinney?

A. Yes, I was talking about guns, but—
* * *

A. —but this statement he had given to me was given voluntarily by him."

Fairly considered, it is obvious that the officer was interrogating appellant respecting guns and appellant was answering respecting guns and nothing else. The officer's testimony was therefore irrelevant and immaterial and the court erred in denying the motion to strike. The ruling was prejudicial because the testimony invited and permitted false inferences against appellant.

SPECIFICATION OF ERROR NO. 6.

THE DISTRICT COURT ERRED TO THE PREJUDICE OF APPELLANT, AND APPELLANT WAS DENIED A FAIR TRIAL, BY THE COURT DENYING THE REQUEST OF THE JURY DURING ITS DELIBERATIONS FOR A TRANSCRIPT OF THE INSTRUCTIONS GIVEN, AND BY GIVING IN LIEU THEREOF A NEW AND SUPERSEDING JURY CHARGE WHEREIN THE BOUNDS OF PROPER COMMENT BY THE COURT WERE EXCEEDED. (See Appendix for new and superseding jury charge and exceptions thereto.)

The jury interrupted its deliberations to request a transcript of the instructions that had been given. T 473. The court denied the request. T 478. In lieu thereof it gave a new and superseding jury charge. T 477-497. Inclusion of this jury charge in the above Specification of Error would be impractical, and it is therefore printed in an Appendix to this brief. A supplemental instruction removed the basis for the exception to the part of the charge which stated that "neither the defendant nor the Government has produced Mrs. Thomas". T 493, 501-502.

This new and superseding charge was accompanied and emphasized by writings and diagrams made on a blackboard by the trial judge. T 481. Fairly considered, it was virtually another argument for the prosecution. It overstated the case of the government; it understated and belittled the case of the defendant.

In reviewing the testimony upon which the government relied, the court said narcotic agent Wells testified he searched "defendant's bedroom" at 803 Haus-ten Street. T 487. According to the record, defendant's counsel objected to this conclusion of the witness, and

although the court did not directly rule on the objection, a ruling sustaining the objection was tacit. T 372. The court said Wells testified he arrested defendant as "they were going downstairs" in response to a call by Sasaki that he had found something. T 487. According to the record, Wells testified he arrested defendant in an upstairs bedroom 30 or 40 minutes after the search warrant was served. T 384. The record has it that the search warrant was served after 12:38 p.m. (T 370-371), and that Sasaki made his discovery at 12:55 p.m. (T 270). The court also said Wells testified that when he asked defendant if certain "stuff" was his, the defendant "shrugged his shoulders and smiled". T 489. The Court supplied the shrugging of the shoulders, for the testimony of Wells is plain that defendant "just smiled". T 383. And in reviewing the government's case the court made no mention of the testimony of a government witness that appellant's residence was at 408 Keanianu Street. T 295-296.

Comments of the court upon the defendant's case are quoted (T 492-493):

"The defendant plead not guilty, and to date, as I understand the evidence, he has not, on his side of the case, admitted or explained, during the course of this trial, any possession of these drugs. The only evidence offered by the defense was that these premises at 803 Hausten Street, according to the records of the local Rent Control office of the City and County of Honolulu were premises owned by some landlord at the time in question by the name of Olson, I believe,

and rented by that landlord to this Mrs. Thomas that we have heard so much about. From that it would appear to my mind—but what inference you gentlemen are to draw from it is for you, and you alone, to determine—it would appear to me, I say, that the defendant, by that evidence was the record tenant, it would seem to me that there was a basis made for a possible inference, which I believe has been argued, that somebody else possessed these drugs. The inference from the defendant's evidence is that Mrs. Thomas possessed these drugs constructively since she was the record tenant of these premises. This is the same Mrs. Thomas that was mentioned throughout the trial as having also been arrested at the time of the raid, the same Mrs. Thomas that the defendant, according to the testimony, advised not to talk, the same Mrs. Thomas that the evidence may show the defendant begged Mr. Wells not to retain in custody and take to the station."

In *United States v. Marzano*, 2 Cir., 149 F. 2d 923, it was said, at page 926:

"Despite every allowance, he (the trial judge) must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge."

From the many cases applying this same rule the following may be cited: *Quercia v. United States*, 289 U.S. 466, 468-472, 53 S.Ct. 698, 699-700, 77 L.Ed. 132; *Starr v. United States*, 153 U.S. 614, 14 S.Ct. 919,

923-924, 38 L.Ed. 841; *Musick v. United States*, 6 Cir., 2 F. 2d 710, 711; *Hobart v. United States*, 6 Cir., 299 F. 784, 785.

When tested by the rule of the foregoing cases, the conclusion cannot be avoided that appellant was denied a fair trial by the new and superseding jury charge given by the trial judge in the present case.

CONCLUSION.

Appellant therefore respectfully submits that judgment and sentence should be reversed as to each count.

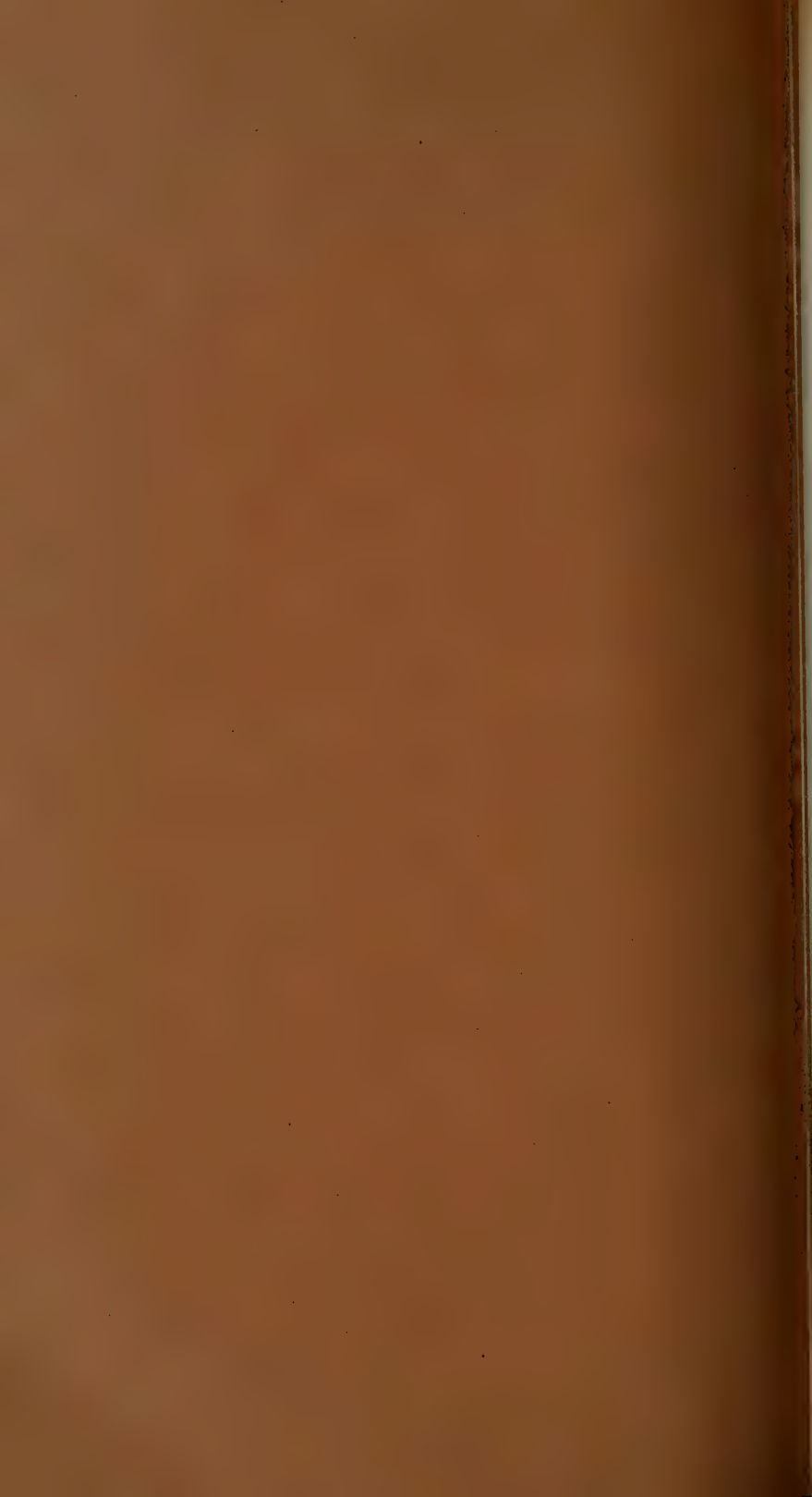
Dated, San Francisco,
August 7, 1950.

SAMUEL LANDAU,
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(Appendix Follows.)

Appendix.



APPENDIX FOR SPECIFICATION OF ERROR NO. 6.
(New and Superseding Jury Charge)

January 11, 1950

The Clerk: Criminal No. 10,253, United States of America vs. Winston Churchill Henry.

The Court: Note the presence of the jury and of the defendant, together with his attorneys.

Last evening at approximately 11 I sent the jury to retire under the supervision and in the custody of the Marshal. All twelve of them are now present. I trust that they have had a good night's sleep.

Before directing them to resume deliberations, I want to come now to the second request which the jury made last evening in addition to permission asked relative to retirement.

The second request was, as you all remember, that there be made available to the jury this morning a

transcript of the Court's instructions, and as I indicated last evening at the late hour, (1) it was not physically possible to have a transcript of the instructions prepared by this morning, and (2) even if it were, I was not sure that I would give you those instructions in written form. As I indicated, or intimated, last evening, in lieu thereof I am going to go over the instructions this morning in my own language and words. I am also going to review some of the evidence for you, but as I do, I want you to bear in mind, as I have told you before, that, though I have the right to comment upon the evidence, I [258] will endeavor to refrain therefrom; but, in any event, should I go over the line and tend, in your opinion, to comment upon the evidence, I want you to remember that it is not what I think or what my opinion may be, but a question to be decided by you. The evaluation of the evidence, the recollection of the evidence, and the findings of fact from the evidence which you are to make are exclusively within your province, and you are to disregard any opinion that you might think that I have.

Similarly, as I review some of the evidence, again it is not what I recall, it is what you recall that the witnesses actually said.

Now, I spent some hour or more yesterday reading to you instructions that the attorneys on both sides requested that I give you. In addition, I gave you some fundamental, basic instructions of my own, and I analyzed the statutes, two in number, that relate to the two counts of this indictment, in my own

language. It occurs to me overnight that between the language that I used and the language that I was requested to read to you that there was probably too much lawyer's language in there for you to digest as readily as we lawyers are able to digest such language, and, I have been told very definitely by the Supreme Court of the United States, instructions are for the purpose of helping the jury understand the law in plain, ordinary language so that they can apply it. So it is because I feel that I have been remiss [259] in reducing that law to plain, simple language that I am going to review the substance of my instructions this morning. Before I do so, let it be recorded that with regard to anything and everything I say the defense may have full and complete exceptions. I do not want to be interrupted during the time that I am talking, but at the conclusion of my remarks I will give you ample opportunity to except to anything I do or say, so if you will make notes of what you want to object to, I will give you ample opportunity. I do not accord that same privilege to the Government, because it hasn't the privilege of taking the exceptions to what I say, or if it does, it doesn't do it any good.

As mentioned yesterday by the attorneys and as stressed by the Court, reduced to its simplest language, this case boils down to a question for you to determine as to whether or not the defendant had possession, actual or constructive, of the narcotics, drugs, alleged in the two counts of this indictment. That is the pivotal, basic question.

It is relatively a simple question, but it is one which must be decided upon the evidence which you gentlemen have heard here in court in this case, and upon nothing else. As I talk to you this morning, I want you continually to bear in mind what I have told you before, and what I am saying is simply to better enable you to understand what I have said before, for I am not going to say anything different. I am simply [260] saying it in my own language, which I hope will be a bit clearer than the language which I used yesterday.

I simply, therefore, recall to your minds that which remains true, that in this, as in any criminal case, the burden of proof to prove all of the necessary factors to constitute the offense is upon the Government, and that burden of proof does not shift. I have talked yesterday and will today talk about a different kind of a burden, which does not disturb the ultimate burden of proof. This other burden that I have spoken of and do refer to and will explain in greater detail later is simply the burden of going forward with the evidence. Those are technical, legal terms, but I think I can make it clear to you what I mean. I repeat, the burden remains on the Government throughout the case from the beginning to the end. Also, this very real, substantial presumption of innocence surrounds the defendant and remains with him until by the evidence, as measured and tested by the law, you are, if you are, satisfied beyond a reasonable doubt of his guilt as charged.

Let us take up the subject of the law once again as to counts 1 and 2. In order for you to understand it better I will draw you, as I have had to do for myself, a diagram. Mr. Clerk, you make a copy of what I put on the board so that you have a record of it.

The Clerk: Yes, your Honor. [261]

The Court: Count 1 of the indictment, you will recall, deals with two kinds of drugs, heroin and cocaine, and it is alleged by the Government that the defendant purchased a certain quantity of heroin and cocaine.

Now, under the statute, which I have read to you before, and repeat again, it is provided by law that "it shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in Section 2550(a)"—and that includes heroin and cocaine—and remember he is simply charged with purchase—"except" the statute goes or "in the original stamped package or from the original stamped package; * * *" Now, "original stamped package or from the original stamped package" means this: "stamped" refers to Internal Revenue stamps required to be placed upon drugs and the tax paid upon their value in accordance with the statute; and "the original stamped package" means the original package from which they came from the factory; "from the original stamped package" means when they are lawfully dispensed pursuant to prescriptions by a doctor or otherwise directly to a patient from an original stamped pack-

age. You will remember that I mentioned that yesterday, as those are exceptions to the statute, namely, prescriptions and dispensations directly by doctors to patients.

Now let us read this again:

“It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; . . .”

And the statute goes on and says:

“And the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; . . .”

Now, what does the Government have to prove under count 1? It must prove the nature of the drug. There is no dispute in this case that the drugs in evidence are cocaine and heroin.

They must prove that the defendant, as charged, purchased those drugs and at the time of purchase the purchase was not in or from an original stamped package.

As I told you yesterday, we haven't heard a word in this case about purchase. We have heard about whether or not these drugs have Internal Revenue stamps upon them or the containers. There are no Internal Revenue stamps upon these drugs, indicating they were tax-paid. The Government has to prove, as it has, the absence of tax-paid stamps. There is no dispute about that.

Now the Government also has to prove that the defendant had actual or constructive possession of these drugs upon which there were no tax-paid stamps.

I have told you the Government has proven the absence of [263] stamps. Here is the pivotal question: possession.

A Juror: May I sit here. I can't see.

The Court: Certainly. Can you see?

Mr. Landau: I believe I can see all right, your Honor.

The Court: Now, if by the evidence the Government has proved to your satisfaction beyond a reasonable doubt that the defendant, as charged, did have possession of these drugs, there then arises under the law, pursuant to another rule of law, what to the law is known as a presumption of fact, which is a reputable presumption, placing the burden of going forward and explaining satisfactorily that possession as being either lawful, or innocent, or unconscious; lawful, by proving, for example, that it was lawfully acquired; innocent, that nothing was known about it, or that the person didn't know they were drugs; that somebody put them in his pocket and, unknown to him, he was unconscious of carrying them around or having them in his possession. The law then provides that unless that possession is satisfactorily explained, if it is not, then there arises a proposition that that presumption proves and takes the place of independent evidence to prove these two missing links and warrants a conviction.

So you see, as we have said to you, the lawyers and I, the pivotal question is possession. That is how the statute works.

The operation of the other statute under marihuana act [264] is quite similar. I will just run over it briefly. In essence it is the same. The Government, under this second count has to prove the nature of the drug, which it has proved, and as to which there is no dispute. It has to prove that the defendant was a transferee required to pay the tax imposed on transferees of marihuana. You know what the word "transferee" means. If you transfer something to me, I am the transferee and you are the transferor.

The Government must also prove that the defendant acquired this drug without having paid the tax, and if the Government additionally proves that the defendant possessed the drug and failed after reasonable notice and demand by the Collector of Internal Revenue to produce the order form covering it and required by law to be retained by the transferee—I will just abbreviate that on the board. I repeat, if the Government proves possession and proves also beyond a reasonable doubt the failure of the possessor to produce, after a proper demand, the order form covering that drug, then there arises a presumption, which is reputable, if the defendant in the face of such wishes to go forward and explain that possession, and that presumption, unless explained to your satisfaction, as in the other statute, takes the place of independent, direct proof of these

second and third steps that I have outlined, namely, as the statute says:

“ . . . proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order [265] form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590(a).”

Now, that is, once again, how the statutes operate. Boiled down, in essence the law is that anyone having been proven to be in possession of any drugs has the burden of explaining satisfactorily that possession as being lawful, innocent, or unconscious.

Now, what is the evidence as to possession? For in count 2, like count 1, the pivotal fact which you must be able to find beyond a reasonable doubt to exist upon the evidence, is the fact of possession.

Upon what evidence in this case does the Government rely and contend on the basis of which it has proven to your satisfaction beyond a reasonable doubt the defendant had possession? The evidence is all circumstantial save and except as there may be found by you to be any admissions made by the defendant by word or act.

You will remember the definitions which I gave you yesterday of direct and circumstantial evidence, and that circumstantial evidence, to be of merit, must be consistent with each other, various things established by the circumstantial evidence must be

consistent and consistent with no other hypothesis except that of guilt. [266]

You will remember also the ways in which I defined for you the meaning of the term "reasonable doubt." Just briefly, that must be a doubt based upon reason; that it is not an imaginary, speculative doubt; that it may be a doubt created by the lack of evidence or by the evidence itself, but it is a doubt which is based upon reason, and that you are satisfied beyond a reasonable doubt or beyond all reasonable doubt when you are satisfied to a moral certainty.

The evidence upon which the Government relies, as I recall it—and I repeat, it is not what I recall, it is what you recall—but, as I understand it, the Government relies upon the fact that it served a search warrant upon the defendant. You will recall Mr. Wells' testimony that as he approached the defendant and informed him that he had a search warrant for the defendant's premises. The defendant, as I recall the testimony from Mr. Wells, said "OK," or words to that effect, and he and the officers, with Mr. Wells, then went to the rear house at 803 Hausten Street here in the City and County of Honolulu. When they got there, the door through which they wished to enter apparently was latched, or locked, or something; in any event, the testimony is that the defendant called to someone inside to free the door in some way so that the people could come in; that they did go in; that there in the living room, Mr. Wells testified, he served the search war-

rant upon the defendant and, as required, undertook to read [267] the search warrant to the defendant. The defendant waived the reading of the search warrant.

Mr. Wells further testified about proceeding upstairs and searching a bedroom, which he said was the defendant's bedroom, which he later also called the mauka bedroom.

Wells further testified that after he was called downstairs by Sasaki to see something found upon the search of his assistants, such as was Sasaki, as they were going downstairs, the defendant being with Wells, Wells placed the defendant under arrest.

The Government further, as I understand it, relies, for whatever value it may have, upon a statement made by the defendant to Wells at the time Wells was estimating the grainage content of that small white bottle, which I understand is cocaine. You will recall Wells testified that he estimated it contained about 200 grains, and the defendant ventured the opinion that it contained more than that, or words to that effect.

Then you will recall the Government relies on another element relating to a closet which Wells testified he wished to search. Upon finding it locked, Wells called upon the defendant for the key. Wells testified that the defendant indicated negatively as to the key. I am not saying one way or another just what the defendant said; that is for you to recall. But there was some problem about the key; let's put [268] it that way, the problem being solved,

according to Wells' testimony, by the defendant's calling upon Mrs. Thomas to produce the key, which was produced. The key fitted the door, the door was unlocked, Wells found inside there something which caused him to make a remark which you will recall, to which the defendant, according to Wells, replied, "That was there when I moved in." I think they called that a panel. I will just put the word panel down there as indicative of what I am referring to. It is for you to remember actually what it was.

Next, the Government places some reliance upon the fact that Wells testified at a point of time near the end of the search he was washing his hands in the kitchen and he remarked to the defendant that he had a nice place here and asked him how long he had been living there, to which the defendant made a reply. What the defendant said you know as well as I. I will label that "washing of the hands incident."

Next, I understand the Government to be placing reliance upon what, at or about that same time that I have just referred to, the defendant said and did with reference to Wells, and to be placing reliance upon it despite the fact that at the time the defendant was then and there under arrest. As I have told you, the law is that a person under arrest is not required, and cannot be compelled, to do anything or say anything that may in any way incriminate him, but that, however, [269] the fact that a person may be under arrest does not preclude him from freely and voluntarily, without compulsion or coercion,

doing or saying anything that he may wish to say. Whether these things that followed the time or arrest were free and voluntary acts of the defendant is for you to decide. The incident that I was about to come to as being the next item upon which I understand the Government relies is the fact that the defendant came to Wells making representations to him that Wells shouldn't take, or need not take, Mrs. Thomas, who was found on the premises, to the police station, or take her somewhere in custody, for the reason that she knew nothing about this stuff. I don't purport to be quoting the defendant's exact words. That is the substance of it, as I recall it; it is for you to recall exactly. Whereupon, Wells asked the defendant whether or not then this stuff was his. Wells testified at that point that the defendant shrugged his shoulders and smiled. Does that have any significance? That is for you to determine. We will put down, for lack of a better label, as the smile and shrug.

Next I understand the Government to rely upon the testimony of Sergeant Kinney. I believe it is sergeant; I don't know what the rank is. But you will recall that his testimony was that on this same day in question, that all of the witnesses had been talking about, at the police station, to which the defendant had by Wells been taken under arrest, [270] Kinney talked to the defendant and the defendant talked to him, and that they were talking about guns. Why they were talking about guns we don't know; it is none of our concern; guns are not a part

of this case. But the testimony of Kinney is that they were talking about guns, and, as they did, Kinney says the defendant said to him that he was responsible for everything that was found there and that he had lived there approximately two months. What was the defendant talking about? What did the defendant mean? What is its weight, significance and value in conjunction with the other things upon which the Government relies is for you to determine, not me.

You will also recall that this same witness Kinney testified that he did not so testify at some proceeding in the district court or police court, the exact nature of which we know not what it was, and it is of no concern to us; but that whatever the proceeding was he did not give this information at that time to Counsel who was questioning him on the subject of whether he knew, or not, where the defendant lived. His answers to the questions along that line, you will recall, were, in substance, to the effect that he didn't so testify because he was not asked. How much weight you are going to place on Sergeant Kinney's testimony is for you to determine, tested and measured by the various tests and measurements I have given you as applicable to all witnesses.

Now, there may be other things that the Government relies upon to establish this fact or possession and as claiming on the basis of which they have proven beyond a reasonable doubt that the defendant had possession, I don't know, but those are the things that occur to me that they are relying upon.

I may be mistaken; there may be more or less. It is for you to determine. In any event, there is no reliance or contention made, as I understand it, by the Government that the defendant was in actual, physical possession of these drugs, such possession as I have of this piece of chalk that I have in my hand.

Their contention and argument seems to be that, putting all of these things upon which they rely together and taking all of the evidence into consideration, they believe that by circumstantial evidence and by acts and actions of the defendant they have, they claim, proven to your satisfaction beyond a reasonable doubt that the defendant did have possession and, if they have, there is a burden of going forward as a matter of law, upon the defendant to explain that possession. That is the Government's contention. Whether the Government is right or not, you, and only you, know and can determine.

What do we have on the other side of the picture? We have, first and foremost, the proposition of law that I have told you about, that the defendant is presumed innocent, that [272] he doesn't have to testify in his own behalf, and that no adverse inference may be drawn by you from the fact that he does not testify. You may ask, How is that so if he has the burden of going forward with the evidence to explain possession if we should find from the evidence beyond a reasonable doubt that he did have possession? The answer to that is: The de-

fendant may testify if he wants to, or he may call others to testify for him and to explain that possession, or he may be satisfied that the Government hasn't proved beyond a reasonable doubt to your satisfaction that he did have possession, and he is willing to take the risk of the opinion that he has to explain anything.

The defendant plead not guilty, and to date, as I understand the evidence, he has not, on his side of the case, admitted or explained, during the course of this trial, any possession of these drugs. The only evidence offered by the defense was that these premises at 803 Hausten Street, according to the records of the local Rent Control office of the City and County of Honolulu were premises owned by some landlord at the time in question by the name of Olson, I believe, and rented by that landlord to this Mrs. Thomas that we have heard so much about. From that it would appear to my mind—but what inference you gentlemen are to draw from it is for you, and you alone, to determine—it would appear to me, I say, that the defendant, by that evidence that Mrs. Thomas was the [273] record tenant, it would seem to me that there was a basis made for a possible inference, which I believe has been argued, that somebody else possessed these drugs. The inference from the defendant's evidence is that Mrs. Thomas possessed these drugs constructively since she was the record tenant of these premises. This is the same Mrs. Thomas that was mentioned throughout the trial as having also been arrested

at the time of the raid, the same Mrs. Thomas that the defendant, according to the testimony, advised not to talk, the same Mrs. Thomas that the evidence may show the defendant begged Mr. Wells not to retain in custody and take to the station.

Neither the defendant nor the Government has produced Mrs. Thomas. As to the weight and significance that you are to attach to the Rent Control records, that is for you to determine. You will recall, however, that Miss Kellett from that office testified that the office had received a memorandum from a Mrs. Olson saying that she had sold the premises as of August to a Dr. Borja, I believe, and that the Rent Control office had not been able to locate that Dr. Borja to date, and that upon the suggestion Counsel made to the witness as to where the Rent Control office might locate this man here in the city and county of Honolulu, the witness indicated she would follow up that suggestion. I repeat, it is for you to determine how much weight you are to place upon this and any other bits of evidence. You, and you alone, are the sole [274] judges of the weight and significance of the evidence and of the credibility of the witnesses.

Over all, both sides approach one aspect of this problem from the same direction. The Government approaches it from two directions. The Government approaches the problem of the house, the real estate, as does the defendant by the testimony which he has produced, that the problem of the house has this significance, as I told you yesterday when we

were defining more specifically the meaning and significance of the term "possession": On the one hand, from its evidence, the Government would contend that if you find beyond a reasonable doubt that, regardless of who the record tenant was, the defendant was in fact the real tenant of these premises, that it may therefore be said, as a matter of law, that he had constructive possession of the contents and articles in, on, and about those premises. With the same rule of law in mind, the defendant comes forward and says Mrs. Thomas was the tenant and therefore, if there was any personal property on these premises, the indications are that she was the one who possessed the contents of these premises and the things in, on, and about them.

The second angle from which the Government approaches this problem is independent of the house and problem of constructive possession. It secondly approaches the problem directly as to these narcotics, from the standpoint of constructive possession of these narcotics separately and [275] independently from the problem of the house and would no doubt have you believe that it has satisfied you beyond a reasonable doubt that from the things that it relies upon, all put together and weighed and assessed and valued and evaluated it has proven that the defendant had knowing, conscious control and dominion and possession of these narcotics, narcotic drugs, upon the basis of which the Government contends the presumption of law that I have spoken of earlier comes into operation.

Over all, what the law is you must take from me as I give it to you, and not from the lawyers. Whether I am correct or incorrect as to what the law is is my responsibility. I believe I have given it to you correctly and clearly and simply, and that as given to you in these instructions, it should be most adequate to enable you to reach a verdict as to counts 1 and 2.

As to what the evidence is, I repeat, you, and you alone, are the judges of it, how much weight and significance you are to give to it. You are the sole judges of the facts and of the credibility of the witnesses. You are to disregard anything you might think I think. You are to arrive at your own independent judgment, and each and every one of you, in order to find the defendant guilty, must be satisfied beyond a reasonable doubt, as the case stands, that the defendant did have possession of these narcotics. If you are not so [276] satisfied, you must acquit.

A form of verdict has heretofore been prepared for you, but it occurs to me that if, for example, that form of verdict does not correspond with what you gentlemen find, you may use your own form of verdict, for the reason that this form of verdict is simply prepared for your convenience, but there is no special significance to the particular form that we have given to you. In fact, you do not have to write out your verdict at all. You can announce it in open court, if you see fit. It is merely a form after all.

With this review of the law and the evidence I will conclude my remarks, unless there are any questions that you wish to ask me.

Mr. Andre.

Juryman Andre: Your Honor, no questions at this time.

The Court: Very well. Do you want to take any exceptions to anything I have said?

Mr. Soares: I think we have some exceptions.

The Court: Do you want the jury excused?

Mr. Soares: Yes.

The Court: Will the jury step out, please.

(Exit jury.)

Mr. Landau: Before I make the exceptions with reference to the Court's instructions at this time, it is [277] unquestionably understood that any exceptions we have made to previous instructions, for the reasons stated in the Court's chambers will be considered as applying to the same instructions.

The Court: Yes.

Mr. Landau: I take exception to your Honor's remarks and instructions to the jury at this time, first, because it has not in any way taken into consideration the facts and effect of the cross-examination of the Government witnesses. I mean, the Court has been completely silent on certain matters which were brought out on cross-examination which were not either cleared, or even mentioned, in the direct examination.

Second, among your Honor's list of items which the Government relied upon to prove possession and

the items which the defendant used to rebut any inference your Honor has been silent, and I know it is not deliberate, it has been completely silent about the testimony of Officer Case to the effect that he was stationed on Kalakaua Avenue at Barbecue Inn for the specific purpose of watching the defendant's residence at 408 Keanianu Street.

We also except to your Honor's remarks to the fact that neither the Government nor the defendant has produced Helen Thomas. There is no duty upon the defendant to produce any witness. The inference is that we have been remiss in our duty. Actually, it is the Government's duty.

No. 12,534

IN THE

United States Court of Appeals
For the Ninth Circuit

WINSTON CHURCHILL HENRY,	}
<i>Appellant,</i>	
VS.	
UNITED STATES OF AMERICA,	}
<i>Appellee.</i>	

On Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLEE.

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UNITED STATES OF AMERICA,	
	<i>Appellant,</i>
	<i>Appellee.</i>

On Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLEE.

STATEMENT OF JURISDICTION.

The District Court had jurisdiction of the trial of this case under 18 U.S.C., Section 3231; Rule 18, Federal Rules of Criminal Procedure. After conviction, a timely appeal was taken, and jurisdiction of this Court to review the judgment of the District Court is given by 28 U.S.C., Sections 1291 and 1294.

STATEMENT OF THE CASE.

The appellant was indicted on September 15, 1949 on two counts. The first count charged violation of 26 U.S.C., Section 2553(a), in that the appellant "did

knowingly, wilfully, unlawfully and feloniously purchase a salt, compound and derivative of opium, to wit, 946 capsules, each containing heroin, and a derivative of cocaine leaves, to wit, 250 capsules of cocaine, which heroin and cocaine was not then and there in the original stamped package and was not from the original stamped package."

The second count charged a violation of 26 U.S.C., Section 2593(a), in that the appellant "being then and there a transferee required to pay the transfer tax imposed by Section 2590(a), Title 26, U.S.C., did knowingly, wilfully and feloniously acquire and otherwise obtain a quantity of marihuana, to wit, 787 grains of marihuana and 35 marihuana cigarettes without having paid such tax."

Appellant was tried by a jury and found guilty on January 12, 1950. (R. 27.) He was sentenced to imprisonment for four (4) years and to pay a fine of \$1,000.00 on the first count; and two (2) years imprisonment with a fine of \$1,000.00 on the second count, the sentences of imprisonment to run concurrently.

On July 12, 1949, William K. Wells, a Federal Narcotic Agent, procured a search warrant directing him to search "a two-story stucco building located at 803 Hausten Street, Honolulu, T.H., said two-story stucco building is painted white with green awning and is the second building in the rear of 803 Hausten Street." (R. 65-67.)

On July 16, 1949, Mr. Wells, in company with several other officers, waited in a building at 807-B Haus-

ten Street, from which they could observe the building at 803 Hausten Street. (R. 258, 273, 370.) About 12:30 p.m. they saw the appellant, Henry, come around the side of the building at 803 Hausten Street and approach an automobile, whereupon, they proceeded to approach the appellant, Henry, at which time Mr. Wells informed the appellant that he had a search warrant to search the premises. The officers, in company with appellant, then approached the building in the rear of 803 Hausten Street and the appellant called to someone inside to open the door. (R. 371.)

Mr. Wells and the officers then proceeded to search the premises. A bottle containing 915 capsules filled with a substance later found to be heroin was found under one of three flagstones in a pathway back of the rear house. (R. 263-264, 267, 270.) A small bottle containing a substance later found to be cocaine was found under a pillow on a sun couch in a patio about 15 feet from where the first bottle was found. (R. 298-299, 309-310, 313.) A box containing 29 cigarettes and a brown paper bag containing a substance found to be marihuana was found jammed between a window screen and a shade on the outside of the building in the rear. (R. 321-323.) Six marihuana cigarettes were found under a sofa in the living room of the house. (R. 327, 334-335.)

It is conceded in appellant's brief that none of the articles discovered in the search bore the necessary narcotic tax paid stamps, and that appellant, upon demand, failed to produce the necessary order forms

respecting marihuana required by 26 U.S.C., Section 2591.

Appellant was placed under arrest 30 or 40 minutes after the search began which was after the two (2) bottles had been discovered. (R. 371, 384-385.)

Six specifications of error are made by appellant each of which will be dealt with separately.

ARGUMENT OF THE CASE.

SPECIFICATION OF ERROR NO. 1.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE FIRST COUNT OF THE INDICTMENT.

The appellant conceded in his brief that there was enough evidence to support a finding that some quantity of heroin and cocaine were on the premises at 803 Husten Street. It is further conceded that there was enough evidence to support a finding of the absence of appropriate tax paid stamps from the drugs found in the search. We agree that the primary question here is whether such drugs were found in the possession of the appellant.

It is true that Officer Case stated he had instructions to observe appellant's residence at 408 Keanianu Street. As a matter of law, a person may have two residences. *Zeibert v. Hunt*, 108 Fed. 449. It is true that the premises at 803 Husten Street were registered to Helen Thomas at the Rent Control Office at Honolulu, T.H., but this has nothing to do with

whether or not appellant, Henry, was in possession of narcotics at the time of the raid.

The government relies on the following acts and admissions of the appellant to show that he was in possession of the drugs:

1. "Henry called to someone to open the door." (R. 371.)

2. "Wells asked if Henry wanted the search warrant read to him" and Henry replied, "No, Billy." (R. 371.)

3. Wells stated he searched the bedroom "occupied by the defendant." (R. 372.)

4. Wells tasted the contents of the bottle and Henry stated, "Man don't do that! Billy, that's dynamite." (R. 378.)

5. Wells said to the appellant, "This bottle must contain about 200 grains." The appellant replied, "No, more than that." (R. 378.)

6. After the arrest the appellant told Helen Thomas to produce the key to the locked closet, which she did. (R. 376.)

7. After the arrest Wells asked the appellant how long he had lived there and Henry replied, "Oh, not very long." (R. 376.)

8. Wells, in referring to a loose panel in the closet, asked the appellant about it, whereupon Henry stated it was there before he moved in. (R. 376.)

9. After the arrest the appellant, referring to Helen Thomas, told Wells, "Billy, you don't have to take her down; she doesn't know anything about the stuff." Wells replied, "Well then, is it your stuff?" Thereupon, Henry "just smiled and didn't reply." (R. 383.)

10. At the Police Station, appellant stated, "I am responsible for everything that was found on the premises" and further stated that he had lived at 803 Hausten Street for about two (2) months prior to the arrest. (R. 413.)

It is maintained in appellant's brief that all the foregoing acts or admissions are uncorroborated in the record. The foregoing statements or acts are not confessions. They are either inculpatory statements or acts evidencing guilt and as such do not have to be corroborated. The appellant did not, in any of the foregoing admissions, expressly admit guilt of the crime, any more than he did at the trial.

Appellant's brief cites *Forte v. U.S.*, 94 F. (2d) 236. That case had to do with rules governing reception in evidence of extrajudicial *confessions*. The difference between *confessions* and admissions by the appellant is made clear in *Ercoli v. U.S.*, 131 F. (2d) 354, which case comments on the *Forte* case:

"In the *Forte* case we stated the applicable rule covering the reception in evidence of extrajudicial *confessions*. In the present case Appellant's statements to the officers were admissions made by the Appellant as exculpatory statements, rather than confessions. He did not in

those confessions admit guilt of crime, any more than he did in his testimony at the trial. The rules governing the reception in evidence of such admissions are much less onerous than those concerning confessions." *Ercoli v. U.S., supra.*

Wigmore, Third Edition, Section 821, contains a discussion of the question presented here.

"What is a confession? A confession is *an acknowledgment in express words*, by the accused in a criminal case, *of the truth of the guilty fact charged or of some essential part of it*. It is to this class of statements only that the present principle of exclusion applies. In this sense, therefore, there are in particular three things which fall *without* the meaning of the term 'confession', and are thus not effected in any way by the present rule, namely, 1. Guilty conduct, 2. Exculpatory statements, and 3. Acknowledgments of subordinate facts colorless with reference to actual guilt." (Italics supplied in part.)

Also, in *Perovich v. U.S.*, 205 U.S. 86, 27 S. Ct. 456, is the following holding:

"Again, it is alleged that there was error in overruling a motion made by defendant to strike out all the testimony given by a deputy marshal of conversations between him and the defendant. As these conversations were not induced by duress, intimidation or other improper influences, but were perfectly voluntary, *there is no reason why they should not have been received.*" (Italics supplied.) *U.S. v. Larkin*, 26 Fed. Cas. 866, No. 15,561; *Wine v. U.S.*, 260 Fed. 911, certiorari denied, 253 U.S. 484, 40 S. Ct. 481; *Miller v. U.S.*, 53 F. (2d) 316.

It is apparent from all of the foregoing that the trial Court very properly allowed the jury to consider the statements or acts of the appellant since they are mere admissions and not confessions, and therefore, corroboration is not necessary. Further, certainly such admissions are of sufficient weight to have enabled the jury to find as a fact that the appellant was in possession of these drugs. Moreover, the Corpus Delicti was proven when it was shown that there were narcotic drugs on the premises without the necessary tax paid stamps, and the presence of such drugs is admitted by appellant. Thereafter, even a confession would have been admissible.

SPECIFICATION OF ERROR NO. 2.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE SECOND COUNT OF THE INDICTMENT.

This specification of error is based upon the same ground as the first one, that is, that the acts and admissions of the appellant were improperly admitted, and what has been said with reference to the first specification is equally applicable here.

SPECIFICATION OF ERROR NO. 3.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF DEPUTY COLLECTOR PATTERSON RESPECTING DEMAND MADE UPON APPELLANT FOR THE NECESSARY ORDER FORMS WITH REGARD TO POSSESSION OF MARIHUANA.

Mr. Patterson, a Deputy Collector of Internal Revenue, testified that he made demand on appellant for the order forms mentioned in Title 26, Section 2593, U.S.C., on September 27, 1949. The appellant was indicted on September 15, 1949, and this specification of error alleges that, since demand was made after indictment, it comes too late.

A complete answer to that contention is found in *Cratty v. U.S.*, 163 F. (2d) 844, in which the identical question is presented. In the *Cratty* case the demand for the order forms was made on the morning of the trial and the same objection was made there as is made here. The Court stated that the objection was without merit as it could not be presumed that there was no other competent evidence before the grand jury of nonpayment of the tax.

SPECIFICATION OF ERROR NO. 4.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF GOVERNMENT WITNESSES RELATING TO INCRIMINATORY ACTS OR ADMISSIONS, WHICH MOTION WAS BASED ON THE GROUND THAT APPELLANT WAS UNDER ILLEGAL RESTRAINT AND WAS NOT ACTING FREELY AND VOLUNTARILY.

There is *no* evidence in the record that the appellant was under any restraint whatsoever. All the

testimony shows that the appellant was acting freely and voluntarily. The only testimony from which even an inference of restraint could be drawn is the testimony of Mr. Wells on cross-examination, wherein he stated that he "required" the appellant to accompany him. On redirect-examination a discussion of the word "required" occurred, and at that time Mr. Soares, one of the attorneys for appellant, agreed that there was nothing significant to the word "required," and that it was equivalent to "merely asking" the appellant to accompany Mr. Wells. (R. 388.) Other than this, there is not so much as one word of proof that the appellant was under any restraint at any time.

Merely because the appellant was under arrest at the time some of the acts were committed or admissions were made does not render such acts or admissions incompetent. *Pierce v. U.S.*, 160 U.S. 355.

"Over objection of counsel for defendant, testimony was given by officers as to the conversations had with the defendant after his arrest. The statements were not confessions, but at most admissions against interest. In the federal courts there is no presumption against the voluntary character of a confession, and the burden is not on the government in the first instance to show its voluntary character. *Gray v. United States* (C.C.A. 9) 9 F. (2d) 337; *Wigmore on Evidence* (2d Ed.) § 860. The mere fact that defendant was under arrest did not render inadmissible the statements which he made. *Ziang Sung Wan v. United States*, 266 U.S. 1, 45 S. Ct. 1, 69 L. Ed. 131; *Pierce v. United States*,

160 U.S. 355, 16 S. Ct. 321, 40 L. Ed. 454. The admissibility of such evidence depends largely upon the circumstances connected with the statements, and the matter is largely to be determined by the trial court. There is nothing in the evidence indicating that the statements were not voluntary, and hence they were admissible." *Hartzell v. United States*, 72 Fed. (2d) 577.

Neither at the trial nor in the brief was any contention made that the arrest was illegal.

SPECIFICATION OF ERROR NO. 5.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF OFFICER KINNEY AS TO A CONVERSATION WITH APPELLANT AT THE POLICE STATION, THE MOTION BEING MADE ON THE GROUND THAT THE CONVERSATION WAS IRRELEVANT AND IMMATERIAL.

An examination of the record will show that the conversation complained of between appellant and Officer Kinney was freely and voluntarily made and that it was a general conversation. The appellant stated that he was responsible for everything in the premises at 803 Hausten Street and that he had lived there two (2) months. Even if Officer Kinney had been referring only to guns, which we do not concede, the appellant was certainly talking about "everything" in the premises. Kinney stated that he was asking questions of the appellant in general, and that the appellant was answering questions in general, and that the statement of the appellant was given voluntarily by him. (R. 419-420.)

SPECIFICATION OF ERROR NO. 6.

THE TRIAL COURT DID NOT ERR BY REFUSING A TRANSCRIPT OF THE INSTRUCTIONS AND BY GIVING FURTHER ADDITIONAL INSTRUCTIONS WHEN REQUESTED BY THE JURY.

The Court's charge was eminently fair, just and reasonable; it neither overstated the case of the government nor understated the case of the appellant. No less than seven (7) separate times the Court charged the jury that it was their province and theirs alone to evaluate the evidence and that they must disregard any opinion that they think the Court might have. (R. 442-443, 478, 486, 489, 493, 495.) We quote the last admonition made by the Court in his charge of additional instructions after having been requested by the jury for such instructions:

“As to what the evidence is, I repeat, you, and you alone, are the judges of it, how much weight and significance you are to give to it. You are the sole judges of the facts and of the credibility of the witnesses. You are to disregard anything you might think I think. You are to arrive at your own independent judgment and each and every one of you, in order to find the defendant guilty, must be satisfied beyond a reasonable doubt, as the case stands, that the defendant did have possession of these narcotics. If you are not so satisfied you must acquit.” (R. 495.)

CONCLUSION.

It is respectfully submitted that the trial Court did not err in any matter brought before it in the trial of this case, and that judgment of that Court should be affirmed.

Dated, Honolulu, T.H.,
September 29, 1950.

Respectfully submitted,

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No. 12,534

IN THE

United States Court of Appeals
For the Ninth Circuit

WINSTON CHURCHILL HENRY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

APPELLANT'S REPLY BRIEF.

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**On Appeal from the District Court of the United States
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APPELLANT'S REPLY BRIEF.

FOREWORD.

Two errors occurring in appellant's opening brief should be corrected. The first error is the date on page 2 in line 3 of the Statement of the Case. The date should be July 16, 1949, and not July 16, 1939. T 2. The second error is the statement on page 3 that the sentences of imprisonment of 4 years and 2 years imposed upon appellant were to run concurrently. The same error occurs at page 2 of the brief for appellee. The fact is that these sentences of imprisonment were to run *consecutively*. T 33.

1. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE FIRST COUNT OF THE INDICTMENT.

Under this subdivision of his opening brief the appellant invoked the rule that his uncorroborated confessions and admissions as to possession were inadequate to support or sustain a conviction on the first count. At page 6 of its brief the appellee urges that this rule has no application to admissions and that admissions only are here involved. But the rule is not so limited. In addition to the cases cited at pages 13 and 14 of the opening brief, these may be added: *Pines v. United States*, 8 Cir. 123 F. 2d 825, 829; *Gulotta v. United States*, 8 Cir. 113 F. 2d 683, 685; *Ryan v. United States*, 8 Cir. 99 F. 2d 864, 869; *Duncan v. United States*, 9 Cir. 68 F. 2d 136, 143. The statement of the rule in *Gulotta v. United States*, 8 Cir. 113 F. 2d 683, 685, is as follows:

“The appellant’s second contention is the more serious. It is that the evidence is not sufficient to support conviction. He relies upon the long-established rule that ‘extrajudicial confessions or admissions are not sufficient to authorize conviction of crime, unless corroborated by independent evidence of the corpus delicti.’ ”

The appellee relies heavily on *Ercoli v. United States*, 131 F. 2d 354. (BA 6.) However, appellee’s quotation therefrom shows that the court was not concerned with confessions or admissions but was solely concerned with *exculpatory statements*. Statements of that character are not here involved.

2. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE SECOND COUNT OF THE INDICTMENT.

What has just been said has equal application, of course, to this specification.

3. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF DEPUTY COLLECTOR PATTERSON RESPECTING DEMAND MADE UPON APPELLANT ON SEPTEMBER 27, 1949, TO PRODUCE ORDER FORMS REQUIRED BY 26 U.S.C., SEC. 2091, WHICH MOTION WAS MADE ON THE GROUND THAT DEMAND WAS NOT MADE UNTIL AFTER THE INDICTMENT HAD BEEN RETURNED AGAINST APPELLANT.

The appellee is mistaken in supposing that appellant's Specification of Error No. 3 was an attack upon the indictment. (BA 9.) It was an attack upon the testimony as to demand because the demand had not been made within a reasonable time. Therefore, the case of *Cratty v. United States*, 163 F. 2d 844, decided in the District of Columbia, and upon which appellee relies (BA 9), does not furnish a complete answer to the specification, as appellee supposes. The decision of this court in *Symons v. United States*, 9 Cir. 178 F. 2d 615, 621, leaves no doubt that such demands must be made within a reasonable time. On the record before the court, appellant urges that the demand was not made within a reasonable time and that his specification of error is well taken.

4. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF GOVERNMENT WITNESSES RELATING TO INCRIMINATORY ACTS OF, AND CONVERSATIONS WITH, THE APPELLANT AFTER SERVICE OF THE SEARCH WARRANT, WHICH MOTION WAS BASED ON THE GROUND THAT APPELLANT WAS UNDER ILLEGAL RESTRAINT AFTER SUCH SERVICE AND NOT ACTING FREELY AND VOLUNTARILY.

In support of this Specification the appellant cited *Upshaw v. United States*, 335 U.S. 410, 411, 414, 69 S. Ct. 170-172, and *United States v. Baldocci*, D.C. Cal. 42 F. 2d 567, 568. Both passed unchallenged in the brief for appellee. (BA 9-11.) Both impel the conclusion that the Specification of Error was well taken.

5. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF OFFICER KINNEY AS TO A CONVERSATION WITH APPELLANT AT THE POLICE STATION REGARDING GUNS, WHICH MOTION WAS MADE ON THE GROUND THAT THE CONVERSATION WAS IRRELEVANT AND IMMATERIAL.

Appellee contends that the conversation was *general* and extended to narcotics. (BA 11.) The record quoted at pages 25 and 26 of appellant's opening brief shows that the conversation was *special* and had reference to guns only. Therefore, the Specification is well taken.

6. THE DISTRICT COURT ERRED TO THE PREJUDICE OF APPELLANT AND APPELLANT WAS DENIED A FAIR TRIAL BY THE COURT DENYING THE REQUEST OF THE JURY DURING ITS DELIBERATIONS FOR A TRANSCRIPT OF THE INSTRUCTIONS GIVEN, AND BY GIVING A NEW AND SUPERSEDING JURY CHARGE WHEREIN THE BOUNDS OF PROPER COMMENT BY THE COURT WERE EXCEEDED.

The appellee does not deny and cannot deny that instead of complying with the jury's request the trial court gave a new and superseding jury charge, which was virtually another argument for the prosecution, which overstated the case of the government and understated and belittled the case of the defendant, and which wiped out the jury charge which the jury asked to have repeated. The sole answer of the appellee is that despite the form and character of the superseding jury charge it was immunized and isolated from error because the court told the jury on several occasions that they were to determine the facts. (BA 12.) The answer is insufficient. If cases additional to those cited in appellant's opening brief at pages 29 and 30 be deemed necessary, it is enough to cite the decision of this court in *Cal-Bay Corporation v. United States*, 9 Cir. 169 F. 2d 15, 22-23.

CONCLUSION.

The appellant therefore again respectfully submits that judgment and sentence should be reversed as to each count.

Dated, San Francisco,
October 25, 1950.

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Attorneys for Appellant.

HERBERT CHAMBERLIN,
Of Counsel.

No. 12,534

IN THE
United States Court of Appeals
For the Ninth Circuit

WINSTON CHURCHILL HENRY,	}
vs.	
UNITED STATES OF AMERICA,	
	<i>Appellant,</i>
	<i>Appellee.</i>

APPELLANT'S PETITION FOR A REHEARING
and
MOTION TO STAY MANDATE.

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FILED

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DAVID R. CHAMBERLIN

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No. 12,534

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WINSTON CHURCHILL HENRY,	}	<i>Appellant,</i>
vs.		
UNITED STATES OF AMERICA,		

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable United States Court of Appeals for
the Ninth Circuit:*

The appellant, Winston Churchill Henry, respectfully petitions for a rehearing in the above entitled cause. The grounds urged are these:

1. The court erred in approving the ruling of the lower court denying appellant's motion to strike the testimony of government witnesses relating to incriminatory acts of, and conversations with, the appellant after service of the search warrant, which motion was based on the ground that appellant was under illegal restraint after such service and not acting freely and voluntarily.

2. The court erred in failing to hold that the lower court erred to the prejudice of appellant, and appellant was denied a fair trial, by the lower court denying the request of the jury during its deliberation for a transcript of the instructions given, and by giving in lieu thereof a new and superseding jury charge wherein the bounds of proper comment by the court were exceeded.

1. THE COURT ERRED IN APPROVING THE RULING OF THE LOWER COURT DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF GOVERNMENT WITNESSES RELATING TO INCRIMINATORY ACTS OF, AND CONVERSATIONS WITH, THE APPELLANT AFTER SERVICE OF THE SEARCH WARRANT, WHICH MOTION WAS BASED ON THE GROUND THAT APPELLANT WAS UNDER ILLEGAL RESTRAINT AFTER SUCH SERVICE AND NOT ACTING FREELY AND VOLUNTARILY.

In its opinion this court deemed it significant that the record did not show when appellant was first taken before a commissioner. It is quite true that the record does not disclose that fact. But the record very definitely shows the illegal restraint of which appellant complained. It shows that he was placed under arrest by narcotic agent Wells around 1 o'clock p.m. of July 16, 1949 (T 384); that appellant "was obliged to go along with Mr. Wells" wherever Wells went on the premises during the course of the raid (T 329) and was interrogated during all that time; that appellant was kept at the premises until after 3 o'clock p.m. (T 270) and was then taken directly to the police station where interrogation still persisted around 5 p.m. (T 367, 412). It is unreasonable to suppose that

he was taken before a commissioner on July 16, 1949, after 5 p.m. At the oral argument the statement was made that he was not taken before a commissioner until the morning of July 17, 1949, and counsel for appellee did not challenge the statement. But by 5 p.m. of July 16, 1949, the illegal restraint of which appellant complains had fully occurred. Such facts bring the present case squarely within the condemnation of *Upshaw v. United States*, 335 U.S. 410, 411-414, 69 S. Ct. 170, 93 L.Ed. 100. That case is plain authority for the rule that legal arrest ends where illegal restraint or detention begins. That rule is applicable here. Appellant respectfully urges that a rehearing be granted in order that such rule be further considered and applied.

2. THE COURT ERRED IN FAILING TO HOLD THAT THE LOWER COURT ERRED TO THE PREJUDICE OF APPELLANT, AND APPELLANT WAS DENIED A FAIR TRIAL, BY THE LOWER COURT DENYING THE REQUEST OF THE JURY DURING ITS DELIBERATION FOR A TRANSCRIPT OF THE INSTRUCTIONS GIVEN, AND BY GIVING IN LIEU THEREOF A NEW AND SUPERSEDING JURY CHARGE WHEREIN THE BOUNDS OF PROPER COMMENT BY THE COURT WERE EXCEEDED.

In its opinion this court deemed it significant and determinative that the lower court told the jury several times that it was the ultimate judges of the facts. Such admonition has never been held adequate to excuse partisan comments by a trial judge or justify him in exceeding the bounds of proper comment. (*Quercia v. United States*, 289 U.S. 466, 468-472, 53

S.Ct. 698, 699-700, 77 L.Ed. 132; *Starr v. United States*, 153 U.S. 614, 14 S.Ct. 919, 923-924, 38 L.Ed. 841; *Cal-Bay Corporation v. United States*, 9 Cir. 169 F.2d 15, 22-23; *United States v. Marzano*, 2 Cir. 149 F. 2d 923, 926; *Musick v. United States*, 6 Cir. 2 F. 2d 710, 711; *Hobart v. United States*, 6 Cir. 299 F. 784, 785.) Here in the jury charge in commenting on the facts the trial judge gave to the case of the prosecution more than its maximum strength and to the case of the defendant less than its minimum strength. A fair trial demands something better, and appellant did not receive it. It is therefore respectfully urged that a rehearing should be granted in order that the rule of the cited cases be further considered and applied.

Wherefore it is respectfully submitted that a rehearing should be granted.

Dated, San Francisco,
February 9, 1951.

SAMUEL LANDAU,
W. Z. FAIRBANKS,
LANDAU & FAIRBANKS,
O. P. SOARES,
*Attorneys for Appellant
and Petitioner.*

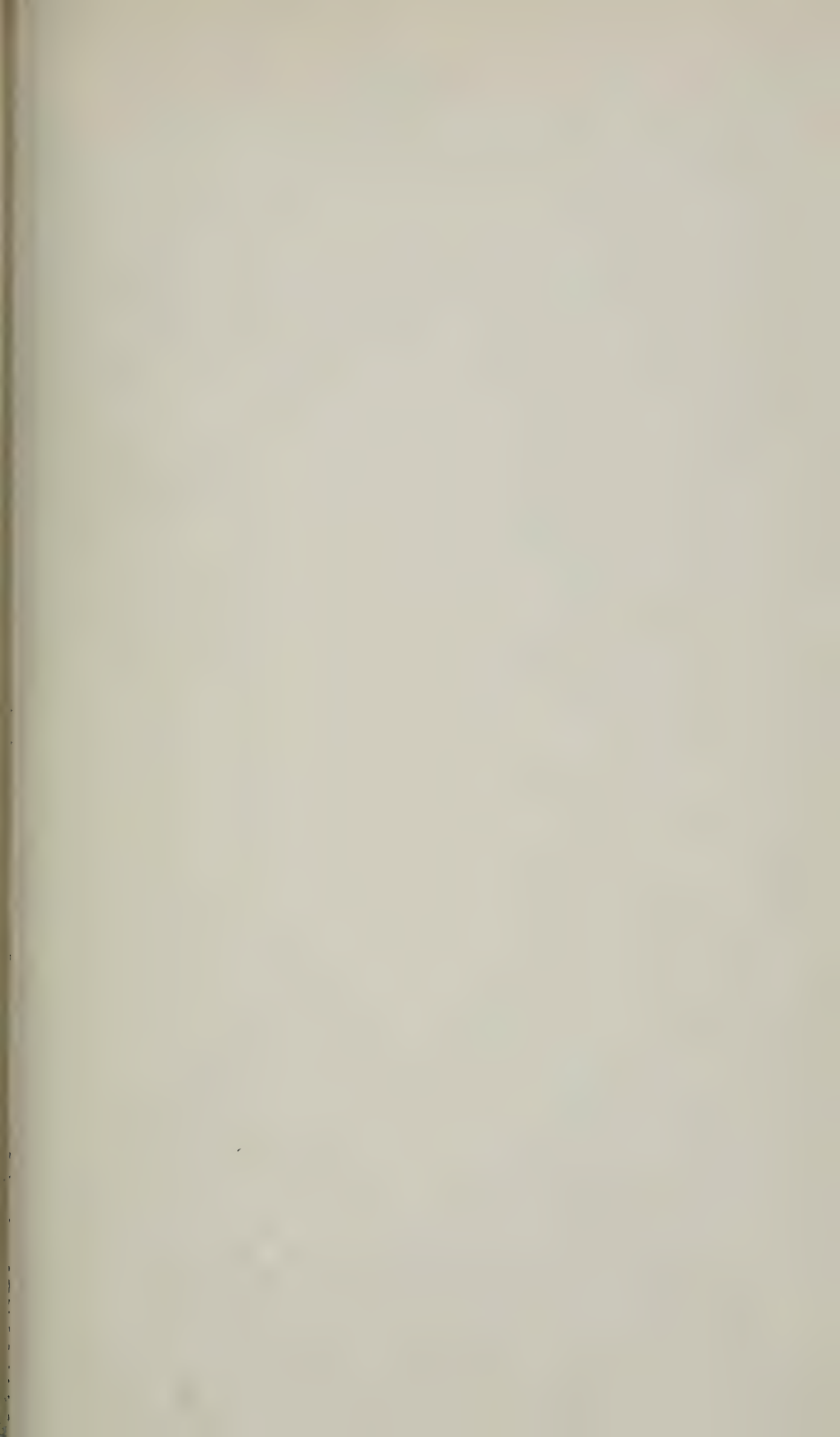
HERBERT CHAMBERLIN,
Of Counsel.

CERTIFICATE OF COUNSEL.

The undersigned, one of the counsel for appellant and petitioner in the above entitled cause, hereby certifies in his judgment the foregoing petition for a rehearing is well founded, in both law and fact, and that it is not interposed for delay.

Dated, San Francisco,
February 9, 1951.

HERBERT CHAMBERLIN,
*Counsel for Appellant
and Petitioner.*



No. 12,534

IN THE
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vs.	
UNITED STATES OF AMERICA,	
	<i>Appellant,</i>
	<i>Appellee.</i>

MOTION TO STAY MANDATE.

*To the Honorable United States Court of Appeals for
the Ninth Circuit:*

The appellant, Winston Churchill Henry, in the above entitled cause, hereby respectfully moves this Court, in the event that his Petition for Rehearing, filed herewith be denied, for an order staying the issuance of the mandate in said cause for a period of thirty (30) days after denial of said Petition, in order to allow appellant to prepare and file a Petition for Writ of Certiorari in the office of the Clerk of the Supreme Court of the United States, and thereafter, until such time as the said Petition for Writ of

Certiorari may be granted or denied and, if granted, until the final determination of the cause.

Dated, San Francisco,
February 9, 1951.

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